Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

SOUTH DAKOTA DEPARTMENT OF REVENUE,

Petitioner,

v.

LOREN POURIER, D/B/A MUDDY CREEK OIL & GAS, INC., AND MUDDY CREEK OIL & GAS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Dakota

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Hayden-Cartwright Act, 4 U.S.C. § 104, which expressly authorizes state taxation of the sale of motor fuel when the sales are made by "licensed traders" on "reservations," authorizes the State of South Dakota to impose its motor fuel tax upon sales of motor fuels within the boundaries of the Pine Ridge Indian Reservation?

2. Whether a corporation formed under the laws of the State of South Dakota can, as a matter of federal law, qualify as a member of an Indian Tribe for the reason that its sole stockholder is a member of the Tribe?

PARTIES

The caption of the case contains the names of all the parties to the proceeding.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
I. This Court Should Grant Certiorari To Resolve The Important Question Whether The Hayden-Cartwright Act Authorizes States To Impose State Motor Fuel Taxes Upon Sales of Motor Fuels Within Indian Reservations	7
II. This Court Should Grant Certiorari To Resolve The Important Question Whether A State-Chartered Corporation May be Considered A Member Of An Indian Tribe	21
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES CITED:

American National Red Cross v. S.G., 505 U.S. 247 (1992) 13

Baraga Products, Inc. v. Comm'r of Revenue, 971 F.Supp. 294 (W.D. Mich. 1997) 25

Baraga Products, Inc. v. Michigan Comm'r of Revenue, 156 F.3d 1228, 1998 WL 449674 (6th Cir. 1998) 24

Cannon v. University of Chicago, 441 U.S. 677 (1979) 12

Chickasaw Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n, 31 F.3d 964 (10th Cir. 1994) 11

Chickasaw Nation v. United States, 534 U.S. 84 (2001) 16

City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1993) 22

Coeur D'Alene Tribe v. Hammond, 224 F.Supp.2d 1264 (D. Idaho 2002) 11

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) 5

Davenport v. Buffington, 97 F. 234 (8th Cir. 1899) 15

Department of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001) 16

Eddy v. Lafayette, 163 U.S. 456 (1896) 15

Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) 13, 16

TABLE OF AUTHORITIES – Continued

Page

Goodman Oil Co. v. Idaho State Tax Comm'n, 136 Idaho 53, 28 P.3d 996 (2001), *cert. denied*, 534 U.S. 1129 (2002) 11

Green v. Menominee Tribe of Indians, 233 U.S. 558 (1914) 15

Herzog Brothers Trucking, Inc. v. State Tax Comm'n, 72 N.Y.2d 720, 533 N.E.2d 255 (1988) 10

In re State Motor Fuel Tax Liability of A.G.E. Corp., 273 N.W.2d 737 (S.D. 1978) 11

King v. Hargadine-McKittrick Dry-Goods Co., 28 S.W. 514 (Ark. 1894) 15

Lorillard v. Pons, 434 U.S. 575 (1978) 21

Mann v. North Dakota Tax Comm'r, No. 31-03-C-0085, slip op. (N.W. Dist. Jan. 12, 2004) 11

Marty Indian School Board v. South Dakota, 824 F.2d 684 (8th Cir. 1987) 11

McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973) 24

Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1943) 23

Neal v. Clark, 95 U.S. 704 (1877) 15

Nevada v. Hicks, 533 U.S. 353 (2001) 8

Noble v. Amoretti, 71 P. 879 (Wyo. 1903) 15

North Star Steele Co. v. Thomas, 515 U.S. 29 (1995) 12

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) 2, 3, 7, 11, 21

Oti Kaga, Inc. v. South Dakota Housing Development Auth., 342 F.3d 871 (8th Cir. 2003) 25

TABLE OF AUTHORITIES – Continued

Page

Perrin v. United States, 444 U.S. 37 (1979) 14

Prairie Band Potawatomi Nation v. Richards, 241 F.Supp.2d 1295 (D. Kan. 2003) 11

Sac and Fox Nation of Missouri v. Pierce, 213 F.3d 566 (10th Cir. 2000) 11

Selkirk v. Stevens, 75 N.W. 386 (Minn. 1898) 15

Standard Oil Co. v. California, 291 U.S. 242 (1934) 3, 18

State Tax Comm'n v. Herzog Brothers Trucking, Inc., 487 U.S. 1212 (1988) 10

Tinker v. Midland Valley Mercantile Co., 231 U.S. 681 (1914) 15

Turner v. Kirkwood, 31 P.2d 935 (Okla. 1934) 15

United States Express Co. v. Friedman, 191 F. 673 (8th Cir. 1911) 15

United States v. Celestine, 215 U.S. 278 (1909) 3, 13, 20

United States v. Douglas, 190 F. 482 (8th Cir. 1911) 15

United States v. Parkhurst-Davis Mercantile Co., 176 U.S. 317 (1900) 15

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 22, 25

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 22

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 8, 10

Winnebago Tribe of Nebraska v. Kline, 297 F.Supp.2d 1291 (D. Kan. 2004) 11

TABLE OF AUTHORITIES – Continued

Page

Winnebago Tribe of Nebraska v. Stovall, 205 F.Supp.2d 1217 (D. Kan. 2002) 11

Wright v. Tebbitts, 91 U.S. 252 (1875) 15

STATUTORY REFERENCES:

1 Stat. 137 (1790) 14

4 U.S.C. § 104 ..... 2, 3

4 U.S.C. § 104(a) 2

28 U.S.C. § 1257(a) 1

37 Stat. 539 (1912) 17

39 Stat. 355 (1916) 17

43 Stat. 889 (1925) 17

48 Stat. 993 (1934) 18

61 Stat. 641 (1947) 3

70 Stat. 799 (1956) 21

Pub. L. No. 74-686, 49 Stat. 1519 (1936) 19

MISCELLANEOUS AUTHORITIES:

3 *Bouvier's Law Dictionary and Concise Encyclopedia* 2918 (8th ed. 1914) 14

4 Journals of the Continental Congress 96 (Jan. 27, 1776) 14

11 Journal of the Executive Proceedings of the Senate 224 (June 27, 1860) 14

15 Journal of the Executive Proceedings of the Senate 880 (June 28, 1866) 15

TABLE OF AUTHORITIES – Continued

Page

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37 Journal of the Senate 127 (Feb. 2, 1846) 14

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57 Journal of the Senate 241 (Feb. 25, 1865) 15

61 Cong. Rec. 7135 (1921) 17

80 Cong. Rec. 6913 (1936) 18

80 Cong. Rec. 8701 (1936) 19

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Hayden-Cartwright Act ..... *passim*

H.R.J. Res. 9, 79 Cong. Rec. 4083 (1935) 18

H.R. Rep. No. 2902, 74th Cong., 2d Sess. 1-2 (1936) 19

Note, *A Winning Hand or Time to Fold? State Taxation of Fuel Sales on Kansas Indian Reservations*, 43 Washburn L.J. 141 (2003) 10

Sixth Circuit Court of Appeals Rule 28(g) 24

Testimony of Ernest Stevens, Jr., Chairman, National Indian Gaming Association, Oversight Hearing on Indian Gaming Regulatory Act, Before the Senate Committee on Indian Affairs, 2001 WL 21757798 (July 25, 2001) 9

TABLE OF AUTHORITIES – Continued

Page

Tim Giago, *Tribes Know Death, But What About Taxes?* (Aug. 8, 2003) http://www.freedomwriter.com/issue28/am30.htm 10

U.S. Department of Interior, *Federal Indian Law* 510 (1958) 8

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Webster's New International Dictionary of the English Language 2118 (2d ed. 1934) 13

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment and opinions of the Supreme Court of the State of South Dakota.

OPINIONS BELOW

The opinions of the South Dakota Supreme Court are reported at 674 N.W.2d 314 (S.D. 2004) and 658 N.W.2d 395 (S.D. 2003). They are reprinted at App. 1 and App. 15, respectively.

The Judgment of Affirmance and Transcript of Bench Decision of the Circuit Court of the Sixth Judicial Circuit are unreported. They are reprinted at App. 43 and App. 45, respectively. The Final Decision of the South Dakota Department of Revenue adopting the Proposed Decision of the Hearing Examiner is unreported. The Final Decision and Proposed Decision are reprinted at App. 51 and App. 52, respectively.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the judgment of the Supreme Court of the State of South Dakota under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

4 U.S.C. § 104(a):

> All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

STATEMENT OF THE CASE

In *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 452-53 (1995), the Court granted certiorari to resolve two issues, the first of which was whether a state may "impose its motor fuels excise tax upon fuel sold by [an Indian tribe's] retail stores on tribal trust land"? One possible answer to that question is that a state may do so because Congress expressly authorized such taxation in the Hayden-Cartwright Act, 4 U.S.C. § 104. Because Oklahoma failed to raise the Hayden-Cartwright Act in the lower courts, however, the Court in *Chickasaw* was forced to answer the question on the assumption that the Act does not apply to Indian reservations. *Id.* at 457. The

Court's resolution of that case – that a state may *not* impose its motor fuel tax on sales within Indian reservations if its legal incidence falls on the tribe or its members – may well be absolutely wrong. Only if the Court takes up the Hayden-Cartwright Act issue, and tests the assumption it made in *Chickasaw*, can there be a definitive answer to the important issue the Court granted certiorari to resolve in *Chickasaw*. This case squarely presents that issue, which is even more pressing today than it was in 1995. This case also squarely presents another important issue of federal Indian law, namely, whether a state-chartered corporation can constitute a "member" of an Indian tribe. A grant of certiorari is therefore warranted.

1. In *Standard Oil Co. v. California*, 291 U.S. 242 (1934), the Court held that California's state motor fuel tax could not be imposed on gasoline sold at the Presidio, a military reservation in California. Predictably, state highway officials complained to members of Congress. In response, Congress enacted the Hayden-Cartwright Act, 4 U.S.C. § 104, which explicitly allowed the state taxation of motor fuels when sold by "filling stations, licensed traders, and other similar agencies, located on United States military or other reservations. . . ."

Later that year, the Attorney General concluded that the term "reservation" in the Hayden-Cartwright Act includes a "military reservation, or an Indian reservation. . . ." App. 80, 82 (quoting *United States v. Celestine*, 215 U.S. 278, 285 (1909)). In 1940, the Solicitor of the Department of Interior issued an opinion also finding that the term "reservation" in the Hayden-Cartwright Act included Indian reservations. App. 84, 99. Shortly thereafter, in 1947, Congress reenacted the Hayden-Cartwright Act without change. 61 Stat. 641, 644 (1947).

2. Muddy Creek Oil & Gas, Inc. (hereinafter Muddy Creek) is a corporation organized under the laws of the State of South Dakota. Prior to 1993, Loren Pourier, a member of the Oglala Sioux Tribe, and another individual were the stockholders of Muddy Creek. In 1993, Pourier became the sole stockholder.

Muddy Creek is licensed by the South Dakota Department of Revenue (hereinafter Department) as a fuel importer, a fuel exporter, a fuel marketer, and a fuel transporter. Muddy Creek retails motor fuels at two off-reservation locations in South Dakota and one off-reservation location in Nebraska. It also retails motor fuels on the Pine Ridge Indian Reservation in Shannon County, South Dakota. This case concerns only the fuel sales from the Pine Ridge Indian Reservation location.

3. Muddy Creek paid the fuel tax under protest, and filed marketer refund claims with the Department in March and April 1999. Muddy Creek argued that it was entitled to a refund of all fuel taxes levied on Indians and non-Indians with respect to fuel sold by Muddy Creek on the reservation. The Department denied the claims. Muddy Creek appealed to circuit court, which remanded for development of a factual record.

On remand, a two-day administrative hearing was held before a hearing examiner. The hearing examiner issued a Proposed Decision on April 5, 2001, App. 52, holding that the Hayden-Cartwright Act "expressly authorizes the collection of state motor fuel taxes upon Indian reservations within the state." App. 78. The Department's Secretary adopted the Proposed Decision as his Final Decision, and denied Muddy Creek's refund claims.

App. 51. The Secretary agreed that the Hayden-Cartwright Act "expressly authorizes the collection of state motor fuel taxes upon the Pine Ridge Indian [R]eservation." App. 51.

Muddy Creek appealed to the circuit court which ruled that

> when you read the language of the Hayden-Cartwright and the Buck Acts and when you read how the terms "licensed traders" and "reservations" were used in the case law at that time, when you look at the legislative history of the Hayden-Cartwright Act and the Buck Act, when you look at the executive interpretations of the Hayden-Cartwright Act immediately after it was passed, in my judgment, all those factors clearly and unequivocally reflect Congress' intent to authorize a motor fuel tax on the reservations.

App. 49. The circuit court affirmed the Department's denial of Muddy Creek's refund requests. App. 43.

4. The South Dakota Supreme Court reversed. The court began by noting that a state may not tax a tribal member or a tribe on an Indian reservation "unless there has been a cession of jurisdiction or other federal statute permitting the tax." App. 18-19 (quoting *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992)). The court ruled that such congressional authorization must be "unmistakably clear." App. 19 (quoting *County of Yakima*, 502 U.S. at 258). The court then held that the language of the Hayden-Cartwright Act did not meet this test. The court viewed the Hayden-Cartwright Act as "vague" and found that Congress had failed to "even address Indian tax

immunity." App. 27. The court labeled reliance on executive branch constructions of the Hayden-Cartwright Act as "tenuous" and "simply not enough." App. 24, 25.

The court then continued its analysis, finding that Muddy Creek qualified as a member of the Oglala Sioux Tribe. App. 29. The court acknowledged that courts had "fairly consistently stated that a corporation lacks racial identity" but, relying on its own earlier precedent, found further that incorporation under state law "does not terminate a tribal entity's Indian status." App. 29. The court continued that when it "went beyond the corporate shield" it found tribal member identity because the corporation's "sole shareholder" was an enrolled member, the business was "operated on the reservation, the vast majority of its customers are Indians residing on the reservation, and it is licensed by the Tribe to do business on the reservation." App. 29-30. The court found additional reinforcement for its position in the fact that Congress had recognized the concept of the "Indian corporation" and that federal Indian policy favored its result. App. 31.

Having found that the Hayden-Cartwright Act did not allow the tax, and that Muddy Creek qualified as a member of the Oglala Sioux Tribe, the court turned to the question of the refund of the illegally collected tax. App. 32. The court concluded that the legal incidence of the tax fell upon the consumer, not on Muddy Creek itself as a marketer. App. 33. The court nevertheless held that Muddy Creek maintained standing to bring the lawsuit because it was forced by state law to "prepay the tax to the State in order to obtain the gasoline." App. 33. It also held that Muddy Creek had standing because it purchased motor fuel on the reservation and that it was itself a "'consumer' of fuel for use on the reservation." App. 33.

After rejecting Muddy Creek's claim that South Dakota's refund statutes violated due process, the court turned to the question of whether state statutes of limitation barred a challenge to the "refund of an illegal tax." App. 34-35. The court remanded the question of refunds to the circuit court. App. 36. Chief Justice Gilbertson concurred specially and Justice Konenkamp, joined by Retired Justice Amundson, concurred in part and dissented in part, each writing on the refund question. App. 37, 39.

Both Muddy Creek and the Department promptly petitioned the South Dakota Supreme Court for rehearing. Muddy Creek's Petition for Rehearing was denied while the Department's Petition for Rehearing was granted on one issue. App. 13. After briefing and argument, the South Dakota Supreme Court determined that the fifteen-month statute of limitations applied to applications for refund by tribal members. App. 2. This petition follows.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari To Resolve The Important Question Whether The Hayden-Cartwright Act Authorizes States To Impose State Motor Fuel Taxes Upon Sales of Motor Fuels Within Indian Reservations.

A. The Applicability of the Hayden-Cartwright Act to Indian Reservations Is an Important and Unresolved Issue of Federal Law.

This Court has at least twice signaled the importance of the determination of the Hayden-Cartwright Act question by explicitly referencing, but declining to answer, the question of its applicability to reservations. In *Oklahoma*

Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 456-57 (1995), this Court "decline[d] to address" the question of whether the Hayden-Cartwright Act "expressly authorizes States to tax motor fuel sales" on "Indian reservations." *Id.* Since the applicability of the Hayden-Cartwright Act was not raised at the lower court level, this Court found itself in the position of rendering a decision by "[a]ssuming . . . that Congress [had] not expressly authorized" the imposition of state motor fuel tax. *Id.* at 458. The worthy question presented in both *Chickasaw* and this case, state motor fuel taxation on Indian reservations, thus has never had the benefit of the Court's analysis of the Hayden-Cartwright Act, the controlling federal law concerning state motor fuel taxation on Indian reservations.

The issue was before the Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n.16 (1980), where the Court found that it "need not reach the more general question whether the Hayden-Cartwright Act applies to Indian reservations at all." Rather than relying on the Hayden-Cartwright Act, the analysis in *Bracker* turned on federal preemption principles, specifically preemption concerning tribal timber. *Id.* at 138.

The question of the applicability and meaning of the Hayden-Cartwright Act is nonetheless of great importance to South Dakota and all states with reservations. In South Dakota, as in all states, "[s]tate sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). Ordinarily, "'an Indian reservation is considered part of the territory of the State.'" *Id.* at 361-62 (quoting U.S. Department of Interior, *Federal Indian Law* 510 n.1 (1958)). As such, the states have a continuing and permanent responsibility to provide services on the reservation, including the obligation to build and maintain

roads. "Indians are generally entitled to the same rights and benefits as other American citizens and residents." *Felix S. Cohen's Handbook of Federal Indian Law* 645 (R. Strickland ed. 1982). This right includes the right to be served by roads.

South Dakota has thus built and maintained roads on each of its seven reservations. The South Dakota Supreme Court found that sixty-six percent of South Dakota's highway funding comes from motor fuel taxes. App. 5. South Dakota has the exclusive responsibility for building and maintaining all state and federal roads which are part of the state system in all areas of the State, including Indian reservations. The federal government, however, contributes a substantial share of the cost of *building* these roads, whether on or off the reservation. The constant wear and tear of travel by reservation residents on both state and federal roads creates a considerable road maintenance burden to the State, a burden *completely* met with state highway funds.

Nearly all states have recognized Indian tribes, with over twenty-five states containing Indian reservations. Thus, the subject faced by South Dakota here is repeated throughout the Nation. The states are obligated to provide services, including roads, to Indians. Moreover, it is likely that filling stations will proliferate on reservations, especially if a tax advantage is involved. Indeed, the description of diversification of tribal enterprises flowing from the huge revenues generated by tribal gambling operations almost inevitably includes gas stations. *See, e.g.*, Testimony of Ernest Stevens, Jr., Chairman, National Indian Gaming Association, Oversight Hearing on Indian Gaming Regulatory Act, Before the Senate Committee on Indian Affairs, 2001 WL 21757798 (July 25, 2001).

The fuel tax controversy exacerbates the budget problems of the states.[1] When a filling station on a reservation fails to collect state motor fuel taxes, the amount of money available for the construction and maintenance of roads throughout the state, including reservations, declines. An additional problem lurks not too far from the surface. It has been noted that there is a "relatively small markup for fuel." Note, *A Winning Hand or Time to Fold? State Taxation of Fuel Sales on Kansas Indian Reservations*, 43 Washburn L.J. 141 n.2 (2003); *see also* App. 75. This means that if tribes are allowed to sell gasoline on the reservation free of the state motor fuel tax, they will have a substantial financial advantage. The typical markup for fuel is approximately ten cents per gallon, while the South Dakota motor fuel tax on gasoline is currently twenty-two cents. Thus, even if the off-reservation entrepreneur cuts his profit to zero, or below zero, he cannot be competitive with a tax-free enterprise on the reservation.

A number of states have argued that the Hayden-Cartwright Act permits state motor fuel taxation of Indians: **Arizona** – *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n.16 (1980); **New York** – *Herzog Brothers Trucking, Inc. v. State Tax Comm'n*, 72 N.Y.2d 720, 725, 533 N.E.2d 255, 258 (1988). *See also State Tax Comm'n v.*

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[1] There is no evidence in the record that the State, since the passage of the Hayden-Cartwright Act nearly 70 years ago, has ever *not* levied the tax on tribal members on the reservation. A prominent Native American publisher, in fact, has asserted that the tax has been levied on tribal members on the reservation for "80 years." Tim Giago, *Tribes Know Death, But What About Taxes?* (Aug. 8, 2003, visited March 22, 2004) <http://www.freedomwriter.com/issue28/am30.htm>.

Herzog Brothers Trucking, Inc., 487 U.S. 1212 (1988); **Oklahoma** – *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 456-57 (1995); *See also Chickasaw Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 31 F.3d 964, 972 n.4 (10th Cir. 1994); **Idaho** – *Coeur D'Alene Tribe v. Hammond*, 224 F.Supp.2d 1264, 1268-69 (D. Idaho 2002) (currently on appeal to the Ninth Circuit Court of Appeals, No. 02-35965); *Goodman Oil Co. v. Idaho State Tax Comm'n*, 136 Idaho 53, 55-59, 28 P.3d 996, 998-1002 (2001), *cert. denied*, 534 U.S. 1129 (2002); **Kansas** – *Winnebago Tribe of Nebraska v. Kline*, 297 F.Supp.2d 1291, 1304-05 (D. Kan. 2004); *Prairie Band Potawatomi Nation v. Richards*, 241 F.Supp.2d 1295, 1303-07 (D. Kan. 2003) (currently on appeal to the Tenth Circuit Court of Appeals, No. 03-3218); *Winnebago Tribe of Nebraska v. Stovall*, 205 F.Supp.2d 1217, 1226 (D. Kan. 2002); *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 575 (10th Cir. 2000); **South Dakota** – *Pourier v. South Dakota Department of Revenue,* App. 15; *Marty Indian School Board v. South Dakota*, 824 F.2d 684, 688 (8th Cir. 1987); *In re State Motor Fuel Tax Liability of A.G.E. Corp.*, 273 N.W.2d 737, 739 (S.D. 1978); **North Dakota** – *Mann v. North Dakota Tax Comm'r*, No. 31-03-C-0085, slip op. at 15-18 (N.W. Dist. Jan. 12, 2004). The only cases to squarely rule on the applicability of the Hayden-Cartwright Act are *Goodman* and *Hammond* from Idaho, *Richards* and *Kline* from Kansas, *Pourier* and *A.G.E.* from South Dakota, and *Mann* from North Dakota. All have ruled that the Hayden-Cartwright Act is not specific congressional authorization for state motor fuel taxation on an Indian reservation, except for *A.G.E.* which was in effect overruled by *Pourier*. App. 21-22.

Thus, at least four states that have relied on the plain language of the Hayden-Cartwright Act for nearly seventy years for authority to impose state fuel taxes on Indian reservations have experienced the loss of taxation authority. While the list of cases above provides evidence that at least seven states have presented Hayden-Cartwright Act arguments to various courts, there are, no doubt, additional states that have viewed the plain language of the Hayden-Cartwright Act as authority for state motor fuel taxation on Indian reservations. There is active litigation over this vexing state taxation issue, state motor fuel taxation on reservations, litigation which will continue absent resolution by this Court.

B. The South Dakota Supreme Court Erred in Holding That the Hayden-Cartwright Act Does Not Authorize State Motor Fuel Taxation on the Pine Ridge Indian Reservation.

1. Plain Meaning.

The text of the Hayden-Cartwright Act permits state motor fuel taxation of fuel "sold by or through . . . **filling stations**, **licensed traders**, and other similar agencies, **located** on United States military or other **reservations**. . . ." (Emphasis added.) The court below came to the facially implausible conclusion that the term "reservation" does not include an "Indian reservation" and that the term "licensed trader" does not encompass traders subject to licensure under the Indian trader statutes. This Court, however, presumes that Congress is thoroughly familiar with its precedents and that Congress expects its enactments "to be interpreted in conformity with them." *North Star Steele Co. v. Thomas*, 515 U.S. 29, 34 (1995) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 699

(1979)). *See also American National Red Cross v. S.G.*, 505 U.S. 247, 252 (1992). No reasonable doubt exists that the terms "reservation" and "licensed trader" had been used individually and together, as of 1936, to refer to Indian reservations.

In *United States v. Celestine*, 215 U.S. 278, 285 (1909), the Court described the term reservation as "any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation. . . ." *Celestine's* juxtaposition of "military reservation" and "Indian reservation" is particularly significant because Congress phrased the Hayden-Cartwright Act similarly, with the only difference arising from the incorporation of all nonmilitary reservations into the term "other reservations." The term "reservation" is so inextricably intertwined with land set aside for Indian occupancy that the exclusion of the term "Indian reservation" from the meaning of "reservation" requires an "artificial" definition. *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 111 (1960) ("Congress was free and competent artificially to define the term 'reservations'" so as to exclude Tuscarora lands which are by "generally accepted standards and common understanding" a reservation).

That the common understanding of the term "reservation" in the 1930s included an "Indian reservation" is reflected likewise in dictionary definitions. A 1934 dictionary definition put before the South Dakota Supreme Court used the following definition: "A tract of the public land reserved for some special use, as for schools, for forests, for the use of Indians. . . ." *Webster's New International Dictionary of the English Language* 2118 (2d ed. 1934). The 1933 edition of *Black's Law Dictionary* defines a

reservation to include "a tract of land . . . such as parks, military posts, Indian lands. . . ." *Black's Law Dictionary* 1542 (3d ed. 1933). *See also* 3 *Bouvier's Law Dictionary and Concise Encyclopedia* 2918-19 (8th ed. 1914) (defining reservation to include areas "such as Indian reservations and those for military posts, and for the conservation of natural resources. . . ."). It is a "fundamental canon of statutory construction" that lacking other definition in the statute, "words will be interpreted as taking their ordinary, contemporary, common meaning" at the time of the statute's enactment. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

The Hayden-Cartwright Act likewise applies to sales by "licensed traders." The congressional history of this term stretches back to the 1776 Continental Congress which had before it a "report on the treaty held with the Indians at Albany" and which adopted a resolution referring to "licensed traders" as promoting a "fair trade" and as relieving "the necessities of the Indians." 4 Journals of the Continental Congress 96, 98 (Jan. 27, 1776). Likewise, the first session of the new Congress in 1790 adopted legislation "to regulate trade and intercourse with the Indian tribes," requiring both Indians and non-Indians to obtain a license from a federal official. Act of July 22, 1790, 1 Stat. 137 (1790).[2] This Court, the lower federal courts,

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[2] Congress has on numerous instances linked licensed traders with Indian affairs. *See, e.g.*, 30 Journal of the House of Representatives 209 (Jan. 16, 1837) (memorial of a "licensed trader in the Cherokee nation of Indians"); 40 Journal of the House of Representatives 187 (Jan. 9, 1845) (petition for compensation for goods forcibly taken from them by the "Pawnee Indians, while licensed traders in the Indian country"); 37 Journal of the Senate 127 (Feb. 2, 1846); 11 Journal of the Executive

(Continued on following page)

and the state courts, have regularly linked licensed traders and Indian reservations.[3]

Finally, it is nonsensical to conclude that Congress used the terms "reservations" and "licensed traders" in the same statutory provision without recognition of their reach into Indian country. *See, e.g., Neal v. Clark*, 95 U.S. 704, 708 (1877) ("So, also, 'the meaning of a word may be ascertained by reference to the meaning of words associated with it.'"). Simply put, one looking for a "licensed trader" in 1936 would find him "located" on an Indian "reservation."

2. The Court Below Misapplied the Canons of Construction.

The court below relied on the premise that if there are two possible constructions of a statute, the court must interpret the statute in favor of the Indian position. App. 19. This Court has recently clarified the appropriate approach to the Indian canons, finding that they cannot be

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Proceedings of the Senate 224 (June 27, 1860); 57 Journal of the Senate 241 (Feb. 25, 1865); 15 Journal of the Executive Proceedings of the Senate 880 (June 28, 1866).

[3] *Green v. Menominee Tribe of Indians*, 233 U.S. 558, 566 (1914); *Tinker v. Midland Valley Mercantile Co.*, 231 U.S. 681, 682 (1914); *United States v. Parkhurst-Davis Mercantile Co.*, 176 U.S. 317, 319 (1900); *Eddy v. Lafayette*, 163 U.S. 456, 465 (1896); *Wright v. Tebbitts*, 91 U.S. 252 (1875); *United States Express Co. v. Friedman*, 191 F. 673, 675 (8th Cir. 1911); *United States v. Douglas*, 190 F. 482, 486 (8th Cir. 1911); *Davenport v. Buffington*, 97 F. 234, 237 (8th Cir. 1899); *Turner v. Kirkwood*, 31 P.2d 935, 936 (Okla. 1934); *Noble v. Amoretti*, 71 P. 879 (Wyo. 1903); *Selkirk v. Stevens*, 75 N.W. 386 (Minn. 1898); *King v. Hargadine-McKittrick Dry-Goods Co.*, 28 S.W. 514, 515 (Ark. 1894).

used to "produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Thus, where there is no ambiguity – as when Congress uses well known and accepted terms such as "reservation" and "licensed trader" and combines them in the same statute – the Indian canons simply do not apply and cannot create an ambiguity where none otherwise exists.

The Indian canons are, moreover, unavailable in this case because the Hayden-Cartwright Act is a statute of general applicability and not subject to the canons. In *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 (2001), the Court refused to read an "Indian trust" exemption into the Freedom of Information Act because there was "no support for the exemption in the statutory text, which we have elsewhere insisted be read strictly in order to serve FOIA's mandate of broad disclosure, which was obviously expected and intended to affect Government operations." *Klamath* had been foreshadowed by *Tuscarora Indian Nation*, 362 U.S. at 116, finding that it was "well settled" that a "general statute in terms applying to all persons includes Indians and their property interests."

3. Legislative History.

The Hayden-Cartwright Act arose at the intersection of a political force known as the "good roads" movement and a 1934 decision of this Court. The "good roads" movement sought local, state, and federal funding of quality, all-weather roads for mail delivery and general public access. *See generally* U.S. Department of Transportation,

Federal Highway Administration, *America's Highways, 1776-1976, A History of the Federal-Aid Program* 36, 41 (1976) (hereinafter "*America's Highways*"). The impetus was the astronomical rise in popularity of the automobile. There were about 8,000 automobiles in the United States in 1900, but by 1915 there were 2,491,000. *America's Highways*, at 54, 67.

Congressional involvement in financing road projects began at least by 1912. *See* 37 Stat. 539, 551-52 (1912). A 1916 act fixed an apportionment formula for fund distribution of federal monies to the states as follows: One-third was distributed on a state's population, one-third on a state's land area, and one-third on rural mail delivery route mileage. 39 Stat. 355, 357 (1916). The formula did not, however, easily mesh with state funding for highways because as of 1916 (1) the states used property taxes to generate funds for highway programs and (2) many states contained massive amounts of federal land that produced no tax revenue. Representative Hayden of Arizona, who later served in the Senate and drafted the Hayden-Cartwright Act, recognized the funding flaw in 1921 when he observed that "the title to every acre within an *Indian reservation*, a national forest, a national park, or a military reservation is also in the United States and for that sole cause is not subject to State taxation." 61 Cong. Rec. 7135 (1921) (emphasis added). The flawed distribution formula was corrected in 1925, in part, when the 1921 Federal Highway Act was amended by inserting the words "and nontaxable Indian lands, individual and tribal" after the words "unappropriated public lands." 43 Stat. 889, 890 (1925).

As the federal government was adjusting its funding mechanism, so were the states. The first motor fuel tax

was imposed by Oregon in 1919. *America's Highways*, at 114. Other states followed and by 1929 road-user taxes represented ninety-nine percent of the actual state expenditures on highways. *Id.* at 115.

The Great Depression further focused congressional attention. During the Depression, tax revenues from income and property taxes dropped drastically but gas tax revenues remained stable. *Id.* at 123. As a result, the federal government designed much of its economic recovery policy around road construction. *Id.* at 123-25. A problem arose, however, because as the Depression progressed, many states diverted motor fuel tax collections to purposes other than road construction and maintenance. *Id.* at 124. By the Act of June 18, 1934, 48 Stat. 993, 995 (1934), Congress provided for limitations of federal aid to those states which drained monies from the motor fuel taxes for other purposes. Anxious to retain their federal funds, states responded with a series of constitutional amendments or statutes which earmarked state fuel tax revenues substantially as demanded by the federal government.

At the same time that the states were responding to the funding challenges imposed by the federal government, the states were dealing with a challenge on a different front. In *Standard Oil Co. v. California*, 291 U.S. 242 (1934), this Court held that California state motor fuel tax could not be imposed on gasoline sold at the Presidio, a military reservation near San Francisco. As a result, motorists could, and were, purchasing Presidio gasoline state tax free for consumption on state-maintained public highways. Complaints were immediate and numerous. *See, e.g.*, H.R.J. Res. 9, 79 Cong. Rec. 4083 (1935); 80 Cong. Rec. 6913 (1936). Congress responded by amending

H.B. 11687, An Act to amend the Federal Highway Aid Act. *See* Act of June 16, 1936, Pub. L. No. 74-686, 49 Stat. 1519 (1936). Senator Hayden moved to amend the bill to provide that "all taxes levied by any State upon sales of gasoline . . . may be levied . . . upon such fuels when sold by or through post exchanges . . . located on the United States military or other reservations. . . ." 80 Cong. Rec. 6913 (1936). The amendment was adopted by the Senate and referred to a conference committee. The conference committee revised Senator Hayden's amendment to provide that "all taxes levied by any State . . . upon sales of gasoline . . . may be levied . . . upon such fuels when sold by or through post exchanges . . . filling stations, licensed traders, and other similar agencies, located on United States military or other reservations. . . ." H.R. Rep. No. 2902, 74th Cong., 2d Sess. 1-2 (1936). The conference committee thus expanded the specifically mentioned outlets which must impose state motor fuel taxes to include "filling stations" and "licensed traders." Representative Whittington, a member of the conference committee, remarked on the floor of the House that "[t]he conferees agreed, therefore, to provide for the collection of all taxes levied by any State, Territory, or District upon the sale of gasoline or other motor-vehicle fuel, except when for the exclusive use of the United States." 80 Cong. Rec. 8701 (1936). The conference committee report ultimately became law.

4. Contemporaneous Executive Branch Interpretations.

The applicability of the Hayden-Cartwright Act to reservations and Indians on reservations was recognized in virtually contemporaneous executive constructions. In

1936, just three months after the adoption of the Hayden-Cartwright Act, the Attorney General concluded that the term "reservation" in the Act includes a "military reservation, or an Indian reservation. . . ." App. 82 (quoting *Celestine*, 215 U.S. at 285). Importantly, the Attorney General concluded that national parks fell within the term "reservation" because, in part, one of those entities – filling stations – is found in national parks. App. 83. The opinion is germane because of its explicit recognition, based on and consistent with *Celestine*, that the term "other reservations" includes Indian reservations and that the term "military or other reservations" is intended to be "comprehensive." App. 82.

The 1940 Solicitor's opinion is directly on point, finding that the term "reservation" in the Hayden-Cartwright Act included Indian reservations. App. 100. Although the Solicitor deemed the question of the Hayden-Cartwright Act's applicability to be unclear, he found the legislative history to remove the perceived ambiguity. The Solicitor relied upon the fact that the Hayden-Cartwright Act was introduced to permit the application of local sales taxes "wherever they were not then collected because the sales were made on a reservation"; that "there was a section devoted to roadways on Indian reservations indicating that attention was called in the consideration of the act to Indian reservations"; and finally, "when the amendment in question was introduced, the agencies enumerated did not include licensed traders and filling stations." App. 99-100. The Solicitor reasoned that the addition of the terms "licensed traders" and "filling stations" indicated an intent to "broaden the application of the statute, and the reference to 'licensed traders' is *particularly suggestive* of Indian reservations." App. 100 (emphasis added). Thus,

while the Solicitor considered the indications "slight," he likewise considered them "sufficient to give ground for considering the broad language of the statute as including Indian reservations." App. 100.

It is particularly important that, following the unequivocal opinions of the Attorney General and Solicitor, Congress reenacted the Hayden-Cartwright Act without change in 1947, 61 Stat. 641, 644 (1947), and added a new section extending coverage to Guam in 1956, 70 Stat. 799 (1956). *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), teaches that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . ." Congress has left undisturbed the definitive interpretations of the Attorney General and the Solicitor and, under *Lorillard*, they should stand.

II. This Court Should Grant Certiorari To Resolve The Important Question Whether A State-Chartered Corporation May Be Considered A Member Of An Indian Tribe.

The court below recognized that this Court, in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 459, found that when the "legal incidence of a tax falls upon a Tribe or its members for sales made in Indian country, the tax is unenforceable" without a clear congressional authorization. App. 28. As demonstrated above, such "clear congressional authorization" exists in the Hayden-Cartwright Act.

Even if that argument is rejected, the particular imposition of the tax on Muddy Creek is nevertheless valid because Muddy Creek is not a member of the Oglala Sioux

Tribe nor is it an "Indian." As noted above, the most salient fact is that Muddy Creek is a corporation organized under the laws of the State of South Dakota. Prior to 1993 it had two stockholders, but since 1993, the sole stockholder has been Loren Pourier, a member of the Oglala Sioux Tribe.

This Court has recognized a distinction between an enrolled tribal member on the member's reservation and all other individuals on that same reservation – whether the individuals are nonmember Indians or non-Indians. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-61 (1980). The error of the court below was in finding that the South Dakota corporation qualified as a member of the Oglala Sioux Tribe under federal law principles explicating state tax limitations. The court's decision effectively made, from whole cloth, a *new kind of enrolled tribal member* with no consideration of the intricacies of federal Indian law or the decisions of this Court.

A. A Corporation Cannot Be a Tribal Member.

This Court found in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977), that "[a]s a corporation, MHDC has no racial identity. . . ." Although this language has occasionally been characterized as dictum, it is clearly part of the reasoning of the Court and it is therefore binding. Even if the statement were regarded as dictum, lower courts are consistently instructed to give the dictum of this Court the greatest deference. *See, e.g., City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993).

The court below compounded its error by finding not only "racial identity" for the corporation but by finding, implicitly, that the corporation had the attributes of a member of a specific Indian tribe – the Oglala Sioux Tribe. The court below thus implicitly found that the corporation is itself entitled to the special privileges and obligations which pertain to members of Indian tribes and which arise from the "'special relationship' between such person and the federal government by virtue of the latter's trust obligation." Conference of Western Attorneys General, *American Indian Law Deskbook* 39 (H. Myers 3d ed. 2004). In fact, this Court has never extended the special privileges and obligations of members of Indian tribes to corporations, and it would be incongruous to do so. This is because there can be no "special relationship" rooted deeply in the Nation's history allowing the United States to have a special relationship with a state-created corporation. Obviously, the special relationship of the United States with "Indians" does not arise with regard to state-created corporations, and nothing the State of South Dakota can do could change that. The court below finally erred by suggesting that it is somehow appropriate to pierce the "corporate veil" to discover the true racial identity and tribal membership of this corporation. App. 29. This, in effect, amounts to declaring the corporation to be, as a matter of federal law, something that it is not and was not alleged to be: A "sham or unreal" entity engaged in a "bald and mischievous fiction." *Moline Properties, Inc. v. Commissioner*, 319 U.S. 436, 439 (1943).

Other courts have come to a different conclusion than the South Dakota Supreme Court. In *Baraga Products, Inc. v. Michigan Comm'r of Revenue*, 156 F.3d 1228, 1998 WL 449674 (6th Cir. 1998),[4] the court squarely confronted the question of whether a state-created corporation, whose single stockholder was a member of an Indian tribe, was exempt from state taxes by reason of its Indian status. The court appropriately relied upon this Court's precedent in *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973), in which this Court found immunity from state taxes with regard to income earned on a reservation by an enrolled member of an Indian tribe "who lives on the reservation of the tribe in which the member is enrolled." *Baraga Products*, 1998 WL 449674 at **2. Baraga Products sought treatment as a tribal member, though it conceded that it was "not enrolled as a tribe member." *Id.* The court lucidly explained that a corporation does not take on the identity of its stockholders, identifying the general rule "that a corporation is an entity distinct from its stockholders." *Id.* The court then applied this rule to the issue here – taxation – finding that the rule of corporate distinctness "is particularly true when a corporation is examined for tax purposes." *Id.* It continued that the "general rule is not influenced by the fact that one person owns all the corporation's stock." *Id.* The court concluded that when a taxpayer seeks and obtains the "advantages of doing business as a corporation, he must be held to its burdens

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[4] Sixth Circuit Court of Appeals Rule 28(g) allows the citation of unpublished decisions if a "party believes . . . that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well. . . ."

as well." *Id.* at **3. As stated by the district court, Baraga Products wanted to "have its cake and eat it too." *Baraga Products, Inc. v. Comm'r of Revenue,* 971 F.Supp. 294, 298 (W.D. Mich. 1997). *See also Oti Kaga, Inc. v. South Dakota Housing Development Auth.*, 342 F.3d 871, 880 (8th Cir. 2003).

As tribal revenues from gambling continue to mount, questions associated with corporate status will arise much more frequently. The present case provides an ideal opportunity for the Court to definitively affirm the conclusion which follows from *Arlington Heights* – a state-created corporation cannot have a racial identity and certainty cannot have an identity as a member of an Indian tribe.

B. The Ramifications of a Corporation as a Tribal Member.

State civil and criminal jurisdiction on an Indian reservation will be affected by transforming a corporation into an enrolled tribal member. A state's civil authority over corporations created under its authority is certainly compromised where, as here, the corporation can successfully claim the status of an enrolled tribal member for tax purposes. No cogent reason has been offered why the same analysis would not extend into other areas of civil jurisdiction. Corporations are not often prosecuted criminally, but the uncertainty injected into the status of a corporation organized under state law by a tribal member no doubt encourages the use of such entities for purposes not intended by legitimate state law.

The present case presents the opportunity to reaffirm the principle that an enrolled tribal member is, as has

been previously thought, a human being who is a member of a recognized Indian tribe.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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674 N.W.2d 314

Supreme Court of South Dakota.

Rehearing of Decision of South Dakota Supreme Court in the Matter of Loren POURIER, d/b/a Muddy Creek Oil and Gas, Inc., and Muddy Creek Oil and Gas, Inc., Plaintiffs and Appellants,

v.

SOUTH DAKOTA DEPARTMENT OF REVENUE, Defendant and Appellee.

No. 22221.

Order Granting Rehearing April 2, 2003.
Argued on Rehearing on May 29, 2003.
Reassigned June 27, 2003.
Decided Jan. 7, 2004.

Vanya S. Hogen, Collette Routel, Richard A. Duncan of Faegre & Benson L.L.P., Minneapolis, Minnesota, Attorneys for plaintiffs and appellants.

Lawrence E. Long, Attorney General, David D. Wiest, Assistant Attorney General, Pierre, South Dakota, Attorneys for defendant and appellee.

Jennifer Fyten, Flandreau, South Dakota, Attorney for Amicus Curiae, Oglala Sioux Tribe.

Terry L. Pechota, Rapid City, South Dakota, Attorney for Amicus Curiae, Rosebud Sioux Tribe.

KONENKAMP, Justice (on reassignment).

Muddy Creek Oil and Gas, Inc., operates Big Bat's Texaco on the Oglala Sioux Reservation. Loren Pourier, an enrolled member of the Oglala Sioux Tribe, is the sole owner of the company. Muddy Creek sought a refund of the South Dakota motor fuel tax it paid. In *Pourier v.*

South Dakota Dep't of Revenue, 2003 SD 21, 658 N.W.2d 395 (*Pourier I*), we unanimously ruled that the taxes were illegally collected because the Hayden-Cartwright Act does not contain express congressional authorization to tax Native Americans on Indian reservations. We also decided that Muddy Creek's consumers, rather than Pourier and his company, bore the legal incidence of the tax, and therefore the consumers were entitled to most of the tax refund. Only to the extent that Pourier and Muddy Creek used gasoline as consumers would they be permitted to claim refunds. We reversed and remanded for proceedings to allow for payment to reservation Indian consumers who apply for and prove their entitlement to refunds. Lastly, in *Pourier I,* with two justices dissenting and one writing specially, two members of this Court also ruled that any "limitation periods imposed by the motor fuel taxation scheme are inapplicable in this case."

After our opinion was handed down, both Pourier and the State petitioned for rehearing, urging us to reconsider certain portions of *Pourier I.* We granted the State's petition, solely on the question of the proper limitations period for refund applications. We now hold that the limitations period applicable in this case is fifteen months under SDCL 10-47B-141 and that claims for times predating December 17, 1997 are untimely. Accordingly, we vacate Issue 4 of *Pourier I,* 2003 SD 21, ¶¶ 35-38, 658 N.W.2d at 406-07, and replace it with the following discussion on the proper limitations period. In all other respects, the decision in *Pourier I* will stand.

Statute of Limitations

In November 1995, Muddy Creek received motor fuel and special fuel licenses from the South Dakota Department of Revenue. In the following years, it filed a succession of refund claims and objections to collection of motor fuel taxes. All claims were denied. In the administrative appeal, the hearing examiner found that no claims were timely for periods before December 17, 1997. All the earlier claims were untimely either because Muddy Creek did not appeal the final decisions of the Department of Revenue denying them or because the claims were filed late. Muddy Creek does not dispute the hearing examiner's findings on the factual timeliness of the refund claims. Instead, it contends that no statute of limitations applies or that a longer statutory limitations period applies.

In agreeing with Muddy Creek's argument, *Pourier I* did not analyze any specific statute of limitations, since two members of the Court ruled that the "justifications [for limitations periods] are simply not present in this case." 2003 SD 21, ¶ 38, 658 N.W.2d at 407. They reasoned that "[b]ecause the State exceeded its authority in imposing this tax, the limitation periods imposed by the motor fuel taxation scheme are inapplicable in this case." *Id.* ¶ 37. On further reconsideration, however, we now conclude that the fifteen-month limitations period applies here. SDCL 10-47B-141 provides:

> Any claim for refund of motor fuel or special fuel tax shall be received by the department within fifteen months of the date the fuel was originally purchased in order to be accepted for refund. Fuel purchased more than fifteen months from

> the date the claim is received is forever barred from refund eligibility.

Muddy Creek cites other possible statutes, such as SDCL 15-2-13 (six years for common law actions) and SDCL 10-59-19 (three years for overpaid taxes), but those do not specifically deal with the time limit for obtaining refunds on motor fuel taxes.[1] In cases where more than one statute arguably touches upon the same subject matter, we presume that the statute with the more specific language "relating to a particular subject will prevail over the general terms of another statute." *Martinmaas v. Engelmann,* 2000 SD 85, ¶ 49, 612 N.W.2d 600, 611 (quoting *Moss v. Guttormson,* 1996 SD 76, ¶ 10, 551 N.W.2d 14, 17).

Muddy Creek cites tax deed cases like *Hough v. Perkins County,* 72 S.D. 236, 32 N.W.2d 632, 633 (1948) to argue that South Dakota's fifteen month limitations period for seeking a refund on motor fuel tax is "inoperative" and inapplicable. These tax deed cases have nothing to do with tax refunds. They stand only for the proposition that certain defects in a tax deed are jurisdictional against which a statute of limitations is necessarily inoperative. *See also Cornelius (Lynch, Intervener) v. Ferguson,* 23 S.D. 187, 121 N.W. 91, 93 (1909). These decisions follow a long line of South Dakota cases standing for the rule that

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[1] The dissent contends that newly enacted Senate Bill 225 is retroactive and imposes a six-year statute of limitations in this case. SDCL 2-14-21 provides that "No part of the code of laws enacted by § 2-16-13 shall be construed as retroactive unless such intention plainly appears." Nothing in this bill indicates, much less plainly indicates, that it is intended to be retroactive.

persons cannot be deprived of their real property through the sale of a tax deed if the defects in the process of obtaining the deed are so serious as to deprive owners of their property without due process of law. Here, with respect to refunds on motor fuel tax, Indian taxpayers will not be deprived of due process. They will have a right to seek a refund within a reasonable time.

Nor will the case of *Pederson v. Stanley County,* 34 S.D. 560, 149 N.W. 422 (1914) avail Muddy Creek. In *Pederson,* this Court held that the common law rule that taxes voluntarily paid cannot be recovered has no application to an instance where the tax was illegally imposed by an outside jurisdiction. Aside from the fact that no statute of limitations was at issue in *Pederson,* we now have a specific statute governing the recovery of improperly collected motor fuel taxes. *See* SDCL 10-47B-141. The Legislature is at liberty to override common law rules by statutory enactment. SDCL 1-1-24.

As for the constitutionality of our fifteen-month statute, the United States Supreme Court has definitively authorized reasonable procedural limitations, including "relatively short statutes of limitation" applicable to tax refund claims. *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dep't of Bus. Regulation of Florida,* 496 U.S. 18, 45, 110 S.Ct. 2238, 2254, 110 L.Ed.2d 17, 41 (1990). The Supreme Court acknowledged this vital issue in dealing with tax refunds, endorsing a State's "exceedingly strong interest in financial stability." *Id.* at 37, 110 S.Ct. 2238. With sixty-six percent of South Dakota's highway funding coming from motor fuel taxes, a short time to obtain refunds is imperative to maintain fiscal soundness. So long as they provide a "clear and certain remedy," indeed, "the States are afforded great flexibility

in satisfying the requirements of due process in the field of taxation." *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n,* 515 U.S. 582, 587, 115 S.Ct. 2351, 2354, 132 L.Ed.2d 509, 516 (1995) (citations omitted). During all times at issue here, South Dakota provided a remedy for obtaining a motor fuel tax refund to those who complied with the procedural requirements in the statutes. Muddy Creek did not comply with those requirements and thus it cannot revive its untimely claims; they are foreclosed and "forever barred from refund eligibility." SDCL 10-47B-141.

Because we have declared unconstitutional the State's collection of motor fuel tax from Muddy Creek, consumers who timely seek and prove their entitlement to a refund may recover the taxes they paid. SDCL 10-47B-131.2. We remand this matter for a hearing where Pourier and Muddy Creek can prove the amount of motor fuel tax they paid as consumers for their personal use. The brunt of these taxes were paid by Muddy Creek's consumers because the hearing examiner found that "Muddy Creek's price at the pump includes South Dakota's $.22 per gallon fuel tax." Since Muddy Creek's customers bore the legal and economic incidence of this tax, a fact the State concedes, any person who was enrolled member of the Oglala Sioux Tribe and who paid the invalidly collected motor fuel tax may timely seek a refund for the taxes paid as part of their purchases made during the same period applicable to Muddy Creek's timely claims. SDCL 10-47B-131.2 provides in relevant part that consumers "of motor fuel [. . .] may apply for and obtain a refund of fuel taxes imposed and paid to this state, if a state or federal court of final appeals finds that taxation of the purchase or use the fuel is preempted by federal law or unconstitutional." Thus, to the extent that Muddy Creek's claims were timely, then

these tribal members, being the actual aggrieved consumers, may be deemed to have their claims considered timely.

Reversed and remanded as modified.

AMUNDSON, Retired Justice and RUSCH, Circuit Judge, concur.

GILBERTSON, Chief Justice, concurs with writing.

SABERS, Justice, dissents.

RUSCH, Circuit Judge, sitting for ZINTER, Justice, disqualified.

MEIERHENRY, Justice, not having a been a member of the Court at the time this action was submitted to the Court, did not participate.

GILBERTSON, Chief Justice (concurring).

In *Pourier v. SD Dept. of Revenue,* 2003 SD 21, 658 N.W.2d 395, I raised a concern over the application of SDCL 10-47B-131.2 and its 15-month statute of limitation, SDCL 10-47B-141, to this case. I felt their validity hinged on whether "those tribal members paid [the gas tax] under coercion and duress." 2003 SD 21, ¶ 49, 658 N.W.2d at 408.

Thereafter this Court granted a rehearing on the refund issue. In the rehearing proceeding, neither party nor the amici convincingly argued that remand was necessary to determine whether the tribal members paid the gas tax under coercion.

Therefore, the validity of SDCL 10-47B-131.2 and SDCL 10-47B-141 stands. *McKesson Corp. v. Division of Alcoholic Beverages,* 496 U.S. 18, 110 S.Ct. 2238, 110

L.Ed.2d 17 (1990). As such, I join in the opinion of the Court.

SABERS, Justice (dissenting).

Upon the grant of the Attorney General's Petition for Rehearing,[2] the issue is which statute of limitation applies, if any, to an illegally collected, unconstitutional tax.

The Attorney General argues in the alternative, that:

1) the fifteen month statute of limitation of SDCL 10-47B-141[3] applies; or

2) the three year statute of limitation of SDCL 10-59-19[4] applies; or

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[2] *Pourier v. South Dakota Dept. of Revenue*, 2003 SD 21, 658 N.W.2d 395 (*Pourier I*).

[3] SDCL 10-47B-141 provides:

> Any claim for refund of motor fuel or special fuel tax shall be received by the department within fifteen months of the date the fuel was originally purchased in order to be accepted for refund. Fuel purchased more than fifteen months from the date the claim is received is forever barred from refund eligibility.

[4] SDCL 10-59-19 provides:

> A taxpayer seeking recovery of an allegedly overpaid tax, penalty or interest shall file a claim for recovery with the secretary, within three years from the date the tax, penalty or interest was paid or within three years from the date the return was due, whichever date is earlier. A claim for recovery not filed within three years of the date the tax was paid or within three years of the date the return was due, whichever date is earlier, is barred.

3) either the six year statute of limitation of SDCL 15-2-13[5] or Senate Bill 225 applies.

Pourier argues that *no* "period of statutory limitation can operate as a bar to the right to abate taxes which were illegally levied and assessed. Any tax which is illegal from the beginning cannot ripen into a legal tax by mere lapse of time." Appellant's Brief, pp. 10, 11 (citing Att'y Gen. Op. 302 (1949-50); Att'y Gen. Op. 53, 54 (1959-60); Att'y Gen. Op. 229, 231 (1971-72)). Pourier argues in the alternative that South Dakota's six year statute of limitation applies to recover illegal taxes paid under duress.

We should accept Pourier's argument in part and hold that South Dakota's six year statute of limitation applies to recover illegal and unconstitutional taxes paid under duress for the following reasons:

1) These taxes were illegally and unconstitutionally imposed.

2) SDCL 10-47B-131.2, which was enacted by the South Dakota Legislature *after* all three of the other statutes of limitations (i.e., the 15 month statute of limitation, the 3 year statute of

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[5] SDCL 15-2-13 provides in part:

> Except where . . . a different limitation is prescribed by statute, the following civil actions . . . can be commenced only within six years after the cause of action shall have accrued:
>
> (1) An action upon . . . [an] obligation, or liability, express or implied,
>
> . . . [,], or (4) An action for taking, detaining, or injuring any goods or chattels, including actions for specific recovery of personal property[.]

limitation, and the 6 year statute of limitation), provides in part:

> A consumer of motor fuel or undyed special fuel may apply for and obtain a refund of fuel taxes imposed and paid to this state, *if* a state or federal court of final appeals finds that taxation of the purchase or use the fuel is *preempted by federal law* or *unconstitutional.*

(emphasis supplied). SDCL 10-47B-131.2 deals specifically with unconstitutional motor fuel taxes and supersedes the more general provisions.

3) In *McKesson,* the United States Supreme Court held:

> If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the state to provide *meaningful backward looking relief* to rectify any unconstitutional deprivation.

McKesson v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 31, 110 S.Ct. 2238, 2247, 110 L.Ed.2d 17, 32 (1990) (emphasis supplied).

4) Additionally, the State argues alternatively that should neither the fifteen month nor the three year statute of limitation apply, the Court should apply the statute of limitations enacted in Senate Bill 225 shortly after this Court's decision in *Pourier.* Senate Bill 225 provides:

> ENTITLED, An Act to limit the amount of time in which a recovery claim for certain paid taxes may be made and to declare an emergency.
>
> BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:
>
> Section 1. That chapter 10-59 be amended by adding thereto a NEW SECTION to read as follows:
>
> Unless a different limitation is prescribed by this title, a claim for recovery of any tax, penalty, or interest shall be filed with the secretary within six years of the date the tax was due or paid, whichever date is earlier.[6]
>
> Section 2. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval.

Senate Bill 225 was approved by the Governor and signed into law on March 25, 2003, to protect the State treasury from substantial tax refunds anticipated by the Attorney General to result from our holding in *Pourier I*.[7]

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[6] Enacted as SDCL 10-59-19.1.

[7] The Attorney General's office argued at oral arguments, and in its brief that failure to impose a statute of limitation in this case would result in the State being forced to pay out refunds dating back to 1923, the year the State began imposing motor fuel taxes. However, the holding in Pourier was limited to its facts and the earliest possible claim would date only to 1995. Furthermore, this assertion by the State is inconsistent with the State's previous argument that it imposed

(Continued on following page)

Although the enactment does not contain express words of retroactivity, it appears clear that the "emergency" was *Pourier I* and that Senate Bill 225 was intended to apply retroactively as the stopgap.

Therefore, consistent with this opinion and a 6 year statute of limitation, we should remand to the trial court with instructions to direct the Department to:

1) Determine the correct amount of the invalid tax (refund) that applies to purchases by Muddy Creek for its use on the reservation.

2) Determine, upon proper application, the correct amount of the invalid tax (refund) that applies to gas purchases from Muddy Creek by reservation Indian consumers.

3) Determine related questions, such as prejudgment interest.

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motor fuel taxes on Native Americans in reliance on the Hayden-Cartwright Act, which was not enacted until 1936.

This assertion is also inconsistent with the Attorney General's letter to Pourier's counsel dated June 11, 1999 which indicated that Pourier's claims were governed by the three year statute of limitation in SDCL 10-59-19.

Moreover, the assertion is inconsistent with the Attorney General's concession that the refund claims made by Muddy Creek for the period of December 17, 1997 through December 31, 1999 were timely filed.

Finally, there is no evidence in the record regarding the State's collection of motor fuel taxes aside from those collected by Muddy Creek.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * *

LOREN POURIER, d/b/a MUDDY CREEK OIL AND GAS, INC., and MUDDY CREEK OIL AND GAS, INC.	)	**ORDER GRANTING REHEARING**
Plaintiffs and Appellants,	)	**#22221**
vs.	)	
SOUTH DAKOTA DEPARTMENT OF REVENUE,	)	
Defendant and Appellee.	)	

Appellee having served and filed a petition for rehearing of the above-entitled cause, the appellants having filed a response thereto, and the petition and response having been considered by the Court, and a majority of the Justices having filed a statement requesting that a rehearing be granted, now, therefore, in accordance with the rehearing rule of the Court, it is

ORDERED that the petition for rehearing be and it is hereby granted solely on Issue One raised by the Department of Revenue.

DATED at Pierre, South Dakota this 2nd day of April, 2003.

BY THE COURT:

/s/ David Gilbertson
David Gilbertson, Chief Justice

ATTEST:

/s/ Shirley Jameson-Fergel
Clerk of the Supreme Court
(SEAL)

(Justice Steven L. Zinter deeming himself disqualified did not participate.)

PARTICIPATING: Chief Justice David Gilbertson and Justices Richard W. Sabers, John K. Konenkamp, Circuit Judge Arthur L. Rusch and Retired Justice Robert A. Amundson.

658 N.W.2d 395

Supreme Court of South Dakota.

Loren POURIER, d/b/a Muddy Creek Oil and Gas, Inc., and Muddy Creek Oil and Gas, Inc., Plaintiffs and Appellants,

v.

SOUTH DAKOTA DEPARTMENT OF REVENUE, Defendant and Appellee.

No. 22221.

Argued Nov. 19, 2002.
Decided Feb. 26, 2003.
Appellant's Rehearing Denied April 1, 2003.
Appellee's Rehearing Granted April 2, 2003, Solely on Issue One.

Vanya S. Hogen of Faegre & Benson, LLP, Minneapolis, MN, Frank Lawrence of Holland & Knight, LLP, Los Angeles, CA, for plaintiffs and appellants.

Lawrence E. Long, Attorney General, David D. Wiest, Assistant Attorney General, Pierre, SD, for defendant and appellee.

Mario Gonzalez, Pine Ridge, SD, Tracy A. Labin, Washington, DC, for Amicus Curiae, Oglala Sioux Tribe.

SABERS, Justice.

Loren Pourier is an enrolled member of the Oglala Sioux Tribe and a resident of the Pine Ridge Indian Reservation in South Dakota. Muddy Creek Oil and Gas, Inc., (Muddy Creek) is a South Dakota corporation whose sole shareholder and president is Pourier. The corporation's principal place of business is Pine Ridge. Muddy Creek purchased gas in Nebraska and trucked it to Pine Ridge for resale to consumers including reservation

residents. The South Dakota Department of Revenue (Department) imposed a state motor fuel tax on Muddy Creek and refused Muddy Creek's refund request without a hearing. Muddy Creek appealed to the circuit court. After oral arguments, the circuit court entered an order remanding the case back to the Department for a full consideration of Muddy Creek's claims. The Department accepted the proposed decision against Muddy Creek from the Hearing Examiner and Pourier appealed that decision to the circuit court. The court affirmed the Department's ruling and Pourier appeals. We reverse and remand.

FACTS

Muddy Creek is licensed by South Dakota as a fuel importer, exporter, marketer and distributor. It is also licensed by the Oglala Sioux Tribe to do business on the reservation, but does not hold a Federal Indian Trader license.

Muddy Creek purchases fuel at a terminal rack in Nebraska and trucks the fuel onto the reservation with its own tanker trucks. The corporation sells the fuel at its retail gas station on the reservation. It is apparently undisputed that approximately 90% of the purchasers are Indians who reside on the reservation.

South Dakota taxes motor fuel at in-state terminal racks and on importation. SDCL 10-47B-5 and 10-47B-6. Since Muddy Creek bought its motor fuel at an out-of-state terminal rack, it was taxed as an importer and was liable for the tax at the point of importation, regardless of use of

the fuel once it entered the state.[1] Muddy Creek has paid the tax under protest since 1995. Pourier testified that he did not pass the tax through to his customers, but evidence at the administrative hearing led the circuit court to the finding that the tax was passed on to the consumers. Specifically, sales to the federal government are exempted from the state motor fuel tax. According to Muddy Creek's own accounts and returns, the government paid 22 cents less per gallon than the pump price. If Muddy Creek were not passing the tax on to the consumer, no such reduction from the pump price for the federal government would have been necessary.

Muddy Creek claims it is entitled to a refund of approximately $940,000.00 for taxes paid since July 1995. The claim is based on the assertion that the State is taxing an Indian on an Indian reservation without explicit congressional authorization. The circuit court held that the Hayden-Cartwright Act of 1936 provided the necessary authorization for the imposition of the motor fuel tax. Muddy Creek appeals raising the following issues:

> 1. Whether the Hayden-Cartwright Act expressly permits state taxation of motor fuel sales to tribal members by a Native American corporation operating on an Indian reservation.

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[1] SDCL 10-47B-6 provides:

> A fuel excise tax is imposed on all motor fuel or special fuel, except unblended ethyl alcohol, imported into this state in the bulk cargo area of any motor vehicle, vessel rail car, or trailer by any means other than through a terminal located in this state, upon its entry into this state[.]

2. Whether Muddy Creek bears the legal incidence of the fuel tax.

3. Whether the State's motor fuel taxation scheme deprived Muddy Creek of procedural due process.

4. Whether State statutes of limitation bar a challenge to an illegal tax in this case.

STANDARD OF REVIEW

SDCL 1-26-36 provides our standard of review for administrative appeals. The statute

> requires us to give great weight to the findings and inferences made by the [agency] on factual questions. We examine agency findings in the same manner as the circuit court to decide whether they were clearly erroneous in light of all of the evidence. If after careful review of the entire record we are definitely and firmly convinced a mistake has been committed, only then will we reverse. Questions of law, of course, are fully reviewable.

Sopko v. C & R Transfer Co., Inc., 1998 SD 8, ¶ 6, 575 N.W.2d 225, 228 (internal citations omitted). Questions requiring application of a legal standard are reviewed de novo. *Voeltz v. John Morrell & Co.*, 1997 SD 69, ¶ 9, 564 N.W.2d 315, 316.

1. WHETHER THE HAYDEN-CARTWRIGHT ACT EXPRESSLY PERMITS STATE TAXATION OF MOTOR FUEL SALES TO TRIBAL MEMBERS BY A NATIVE AMERICAN CORPORATION OPERATING ON AN INDIAN RESERVATION.

A state has no power to tax tribes, Indian reservation lands, or tribal members residing on Indian reservations

unless there has been a cession of jurisdiction or other federal statute permitting the tax. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 502 U.S. 251, 258, 112 S.Ct. 683, 688, 116 L.Ed.2d 687, 697 (1992) (quoting *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973)). In order for the Court to find congressional authorization of such a tax, the Supreme Court has held that Congress must have "made its intention to do so unmistakably clear." *Yakima,* 502 U.S. at 258, 112 S.Ct. at 688, 116 L.Ed.2d at 697-698 (quoting *Montana v. Blackfeet Tribe,* 471 U.S. 759, 765, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985)) (citation omitted). *See also, Oklahoma Tax Com'n v. Sac and Fox Nation,* 508 U.S. 114, 128, 113 S.Ct. 1985, 1993, 124 L.Ed.2d 30, 43 (1993) (stating, "[a]bsent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country"). Furthermore, "[w]hen we are faced with . . . two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in [the United States Supreme] Court's Indian jurisprudence: '[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Yakima,* 502 U.S. at 269, 112 S.Ct. at 693, 116 L.Ed.2d at 704 (quoting, *Blackfeet Tribe,* 471 U.S. at 766, 105 S.Ct. at 2403, 85 L.Ed.2d at 753) (citation omitted). These presumptions and rules of construction form the necessary background to our consideration of any attempt by the State to assert taxation jurisdiction over Indians in Indian Country.

The statute upon which the Department of Revenue bases its claim of right to tax Muddy Creek is 4 U.S.C.

§ 104, otherwise known as the Hayden-Cartwright Act of 1936 (Act). Subsection (a) of the Act provides in part:

> All taxes levied by any State . . . upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States.

The Department contends that by use of the phrases "filling stations," "other reservations" and "licensed traders," Congress manifested the requisite intent to allow the State to tax Indian proprietors on the Indian reservation. We disagree. The language of the statute does not make Congress' intention to allow such taxation "unmistakably clear."[2]

In two cases, the United States Supreme Court has declined to address the issue of whether the Act applies to Indians on Indian reservations. See *Oklahoma Tax Com'n v. Chickasaw Nation,* 515 U.S. 450, 457, 115 S.Ct. 2214, 2219, 132 L.Ed.2d 400, 408 (1995) (declining to address the issue because it was not raised below); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S.Ct. 2578,

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[2] The State of South Dakota argues persuasively that it is responsible for construction and maintenance of the major paved highways (U.S. Highway 18 and South Dakota Highway 407) on the Pine Ridge Reservation. State urges that this expense justifies the motor fuel tax on the reservation. We agree that the expense may justify the tax, but it does very little to make "unmistakably clear" the intention of Congress to permit taxation on Indian reservations.

65 L.Ed.2d 665 (1980) (holding that the Act did not overcome the preemptive effect of federal regulation of tribal timber and declining to reach the question of whether the Act applies to Indian reservations at all). However, this Court has addressed the issue of whether the Act applies to *non-Indians* operating on Indian reservations. In *Matter of State Motor Fuel Tax Liability of A.G.E. Corporation,* this Court stated,

> [w]e are of the opinion that the United States has granted to the states the right to exercise limited jurisdiction in taxing the use or sale of gasoline or other motor vehicle fuel within federal areas in exactly the same manner as if those areas did not exist, except in cases where the gasoline is to be used exclusively by the United States. Jurisdiction was extended to the states by Section 10 of the Hayden-Cartwright Act and in Section 1 of the Buck Act.

273 N.W.2d 737, 739 (1978) (internal citations omitted).

In *A.G.E.,* the Court faced the question whether a non-Indian contractor working on a reservation was subject to state taxation. The narrow holding was that the activities of a non-Indian on Indian land working pursuant to a federal contract were taxable. *Id.* That holding was based on a finding that the contractor did not fall within the federal instrumentality doctrine and that federal law did not preempt the tax. The Court was very clear that its analysis was based on the fact that the State was taxing a non-Indian. The Court also implied that the case would have been different had the taxed party been an Indian or a tribe. *A.G.E.,* 273 N.W.2d at 741. Finally, the language to which the Department refers was unnecessary to the ultimate holding, and was therefore dicta. We do not believe this case is controlling in the present fact situation. The

Supreme Court has consistently distinguished between the power to tax non-Indians in Indian country and the ability to tax Indians in Indian country. The question whether the Act gives the State authority to tax an Indian in Indian country requires a different analysis than that employed in *A.G.E.* With regard to the difference between the taxation of a non-Indian in Indian country and an Indian in Indian country, the Supreme Court has held:

> [W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, a more categorical approach: Absent cession of jurisdiction or other federal statutes permitting it, we have held, a State is without power to tax reservation lands and reservation Indians.

Chickasaw Nation, 515 U.S. at 458, 115 S.Ct. at 2220, 132 L.Ed.2d at 409 (citations and quotations omitted). Regardless of dicta in *A.G.E.,* whether the Act permits state motor fuel taxation of an Indian in Indian country is a question of first impression for this Court to be determined based on the presumptions and rules of construction promulgated by the Supreme Court.

The Department argues that a plain reading of the Act evinces Congress' clear intent to allow state motor fuel taxation of an Indian on an Indian reservation. We will begin with analysis of the language "other reservations." The Supreme Court has defined the term "reservation," stating that it is,

> [u]sed in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or indeed, one for any purpose

> for which Congress has authority to provide, and, when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.

United States v. Celestine, 215 U.S. 278, 285, 30 S.Ct. 93, 95, 54 L.Ed 195 (1909). The Department argues that since the Supreme Court has defined the term "reservation" to include Indian reservations and since it is appropriate to presume Congress is familiar with precedent, we should interpret the Act to include Indian reservations. We cannot presume that Congress assumed "reservation" necessarily included an Indian reservation for the Court also stated in the same paragraph that, "a reservation is not necessarily 'Indian Country.'" *Id.* Furthermore, an Indian reservation has distinct characteristics unique from those of other federal government reservations. *See e.g., Goodman Oil Co. v. Idaho State Tax Com'n,* 136 Idaho 53, 28 P.3d 996, 1000 (2001), *cert denied,* 534 U.S. 1129, 122 S.Ct. 1068(Mem), 151 L.Ed.2d 971 (2002). For example, a national park has only a few of the characteristics of an Indian reservation. Furthermore, federal reservations, such as national parks and monuments and military posts, are created and maintained for the benefit of the federal government. Indian reservations were created for the benefit of the tribes. To assume that in this one instance Congress implicitly relied on this definition to abrogate Indian tax immunity is to ignore the context of the Court's definition and the requirement that Congress manifest its *clear* intent that the Indian in Indian country is taxable.

The Department relies on an opinion by the United States Attorney General to support its argument that "other reservations" was intended to include Indian reservations. The Department argues that the Attorney

General concluded that Indian reservations were included within the Act and failure of Congress to amend the statute in light of that opinion is evidence of its intent to abrogate Indian tax immunity. However, this opinion dealt specifically with the question whether the Act included *national parks* under the term "other reservations." The Department points to the statement by the Attorney General that, "[i]t is true that some of the agencies which are expressly designated in Section 10 apparently are such as usually pertain to military, naval or Indian reservations, and that section does not expressly mention national parks." 38 U.S. Op.Atty.Gen. 522, 524 (1936). The argument that this Court should consider Congress' failure to amend the statute after the Attorney General's opinion as evidence of intent to include Indian reservations in the Act is tenuous. There is no analysis on the question whether Indian reservations fall within the Act. Further, the opinion mentions Indian reservations only in passing to ultimately find that national parks are included in the Act. An opinion by the Attorney General holding that national parks were included within the Act would not have put Congress on notice that Indian reservations were also included.

The Department next argues that the phrase "licensed trader" has become an Indian law term of art and that Congress knew that use of the term would authorize state motor fuel taxation within Indian Country. To support its assertion, the Department cites numerous federal cases using the term "licensed trader" in an Indian law context. It further argues that prior to this Act in 1936, Congress never used the term in a context other than Indian affairs. Even if we accept the proposition that the term "licensed trader" was an Indian law term of art in the federal courts,

there is no sign that Congress treated it as such. Congress gave no indication in the statute that the term referred to Indian traders as opposed to those non-Indian traders who were required to obtain a license to sell fuel.

In 1940, the Solicitor of the Interior issued an opinion finding that Indian reservations were within the Act. Application of Federal and State Sales Taxes to Activities of Menominee Indian Mills, 57 InteriorDec 129 (1940). The Solicitor begins his analysis stating, "[i]t is not clear . . . whether the [Act's] reference to reservations includes Indian reservations." 57 InteriorDec at 138-139. Relying on three indications that the Act applied to Indian reservations, the Solicitor stated that although the indications were "slight," they were sufficient to find that Indian reservations were included. *Id.* The Solicitor's equivocation regarding whether the Act applied to Indian reservations and his admission that the "indications" that the Act applied to Indian reservations were "slight" are simply not enough to overcome the presumption that Indians on Indian land retain tax immunity. However, the circuit court felt that Congress' failure to amend the Act after this opinion was sufficient in part to find intent to abrogate the immunity. We disagree. We cannot find "unmistakably clear" congressional intent by negative implication. *United States v. Board of Commissioners,* 435 U.S. 110, 134-35, 98 S.Ct. 965, 981, 55 L.Ed.2d 148, 168 (1978).

The Act was a floor amendment to the Federal Aid Highway Act legislation of 1936. The language was added to the Act because of a "complaint in many parts of the country about the inability of the States to collect revenue on gasoline sold on Government reservations not for governmental use." 80 Cong.Rec. 6913 (statement by Senator Hayden). The legislative history of the Act contains no

reference to either Indians, Indian reservations, or licensed Indian traders. This absence of comment on Indian taxation is significant since "some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress." *Bryan v. Itasca County,* 426 U.S. 373, 381, 96 S.Ct. 2102, 2107, 48 L.Ed.2d 710. In fact, language found in the legislative history seems to indicate that Congress was primarily concerned with federal officials on federal reservations being immune from state taxation of motor fuel used for personal rather than governmental purposes. There is no indication Congress was concerned with tribal members being exempt from state fuel taxes. The Department cites a statement by a representative who was a member of the Conference Committee as proof of intent to tax Indians. However, that statement is more indicative of the committee's concern over federal officials or employees personally reaping the benefit of federal tax immunity:

> In Post Exchange stores and on Government reservations, gasoline and motor vehicle fuel is being sold free from local taxes. The conferees believe that all local taxes should be collected except when the gasoline or motor vehicle fuels are for the exclusive use of the United States. *The privilege should not be extended to officials or employees when not in the actual discharge of their official duties.* The conferees agreed, therefore, to provide for the collection of all taxes levied by any State, Territory or District upon the sale of gasoline or other motor vehicle fuel, except when for the exclusive use of the United States.

80 Cong.Rec. 8701 (1936) (emphasis supplied). Contrary to the Department's assertion, this language seems to refer more to government officials than Indian tribes or tribal

members. Even if it does not, this language is far from sufficient to show clear legislative intent to abrogate Indian tax immunity. The vague language of the Act, and Congress' failure to even address Indian tax immunity either in the Act or the legislative history, lead us to the conclusion that it failed to manifest unmistakably clear intent to abrogate Indian tax immunity.[3] The circuit court's decision on this issue is reversed.

2. WHETHER MUDDY CREEK BEARS THE LEGAL INCIDENCE OF THE TAX.

Having established that the State does not have authority to impose its motor fuel tax upon Indians residing in Indian country, the question is, who is entitled to the refund of the illegally collected tax. Central to this inquiry is the question of who bears the legal incidence of the tax; Muddy Creek, or the consumers residing on the Pine Ridge Indian Reservation. The Department claims that because the legal incidence of the fuel tax is statutorily imposed upon the consumer, and because Muddy Creek passed the tax on to the consumers, Muddy Creek is not entitled to a refund.[4] SDCL 10-47B-42 (providing, "the

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[3] This Court does not stand alone in coming to this conclusion. Three courts have rejected essentially the same arguments advanced by the State in this case. *See, Goodman Oil Co.*, 136 Idaho 53, 28 P.3d 996; *Coeur D'Alene Tribe v. Hammond*, 224 F.Supp.2d 1264 (D.Idaho 2002). The third case, *Prairie Band Potawatomi Nation v. Richards*, 2003 WL 136197, 241 F.Supp.2d 1295 (D.Kan.2003), was handed down subsequent to oral arguments in this case.

[4] The Department does not appear to contest the fact that the incidence of the tax falls upon either the Tribe or its members. Rather, the Department argues that because Muddy Creek does not bear the legal incidence, it, as opposed to the consumers, is not entitled to a

(Continued on following page)

legal incidence of the tax falls upon the consumer of the fuel for the privilege of operating vehicles on the roads and highways of the state"). Muddy Creek argues in response that although the statute purports to impose the legal incidence of the tax on the consumer, in reality, the incidence falls upon Muddy Creek, as a marketer and importer. It further argues that 1) it did not pass the tax to the consumer and 2) even if it did, that pass-through is irrelevant to determining whether Muddy Creek can receive a refund. In this respect, it is interesting to note that Muddy Creek claims that the refund would be used for the benefit of tribal members. According to Pourier, by investing the refund in his business, he would be spurring economic development thereby improving life for tribal members residing on the reservation.

If the legal incidence of a tax falls upon a Tribe or its members for sales made in Indian country, the tax is unenforceable unless there is clear congressional authorization for the tax. *Chickasaw,* 515 U.S. at 459, 115 S.Ct. at 2220, 132 L.Ed.2d at 409. However, if the legal incidence falls upon non-Indians, "no categorical bar prevents enforcement of the tax; if the balance of federal, state and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy." *Chickasaw,* 515 U.S. at 459, 115 S.Ct. at 2220, 132 L.Ed.2d at 409 (citing *Washington v. Confederated Tribes of Colville*

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refund. This is significant because if the State concedes that the incidence falls upon the Tribe or its members, the per se presumption against taxation applies because the majority of consumers are members of the tribe residing on the Indian reservation.

Reservation, 447 U.S. 134, 154-157, 100 S.Ct. 2069, 2081-2083, 65 L.Ed.2d 10 (1980)).

The Department claims that Muddy Creek cannot meet the threshold requirement of being either the Tribe or an enrolled member of the Tribe because as a corporation, it cannot have the racial identity necessary to fall within the *Chickasaw* rule. In support of this argument, the Department relies on *Baraga Products, Inc. v. Commissioner of Revenue,* 971 F.Supp. 294, 296-297 (W.D.Mich.1997). *Baraga* held that a corporation formed under state law and owned by an enrolled tribal member, such as Muddy Creek, was not an enrolled member of the tribe as required by *Chickasaw.* We disagree and hold that a corporation owned by the tribe or an enrolled tribal member residing on the Indian reservation and doing business on the reservation for the benefit of reservation Indians is an enrolled member for the purpose of protecting tax immunity.

The case principally relied upon by the Department in asserting that Muddy Creek lacks the "racial identity" necessary to allow it immunity from tax is unpersuasive. Admittedly, courts have fairly consistently stated that a corporation lacks racial identity because it is a separate and distinct legal entity. However, courts have also consistently been willing to go beyond the corporate fiction to reach the people behind the corporate veil. Behind incorporation, there remain individuals who maintain a distinct racial identity that protects them from some government actions. This Court has held that incorporation of a not for profit organization under state law does not terminate a tribal entity's Indian status. *Sage v. Sicangu Oyate Ho, Inc.,* 473 N.W.2d 480 (S.D.1991). In *Sage,* this Court went

beyond the corporate shield and looked at the characteristics of the entity to find that the state court had no subject matter jurisdiction over a school operating on the Rosebud Reservation. Specifically, the Court looked to factors such as people who were members in the corporation, the purposes the corporation served and the fact that it was granted a tribal charter by the Tribal Council. *Sage,* 473 N.W.2d at 483-484. Here, Muddy Creek's sole shareholder is an enrolled member of the Tribe, the business is operated on the reservation, the vast majority of its customers are Indians residing on the reservation, and it is licensed by the Tribe to do business on the reservation.

The United States Supreme Court has stated that a corporation has no racial identity and cannot be the target of alleged discrimination. *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Despite this language, the Court found an individual plaintiff within the corporation had standing and therefore never resolved the question of whether the corporation itself had standing. Cases handed down from federal courts since that decision have treated the language in *Arlington* as dicta and have permitted corporations to assert claims under § 1981 based on the fact that a corporation was owned or managed by persons with an identifiable racial identity. *Inash Corporation v. American Dairy Queen Corp.,* 1990 WL 622095 (S.D.Ga.1990) (citing *Howard Security Services, Inc. v. Johns Hopkins Hospital,* 516 F.Supp. 508, 513 (D.Md.1981); *T & S Service Associates Inc. v. Crenson,* 666 F.2d 722, 725 (1stCir.1981); *Organization of Minority Vendors, Inc. v. Illinois Central Gulf RR,* 579 F.Supp. 574, 588 (N.D.Ill.1983); *Rosales v. AT & T Information Systems, Inc.,* 702 F.Supp. 1489, 1494 (D.Colo.1988)).

Furthermore, Congress has recognized the fact that there is such a thing as an "Indian corporation." The Indian Business Development Program is legislation created to "establish and expand profit-making Indian-owned economic enterprises." 25 U.S.C. § 1521. Under federal regulations, the only persons or entities that may apply for funds from this program are, "Indians, Indian tribes, Indian partnerships, corporations, or cooperative associations authorized to do business under State, Federal, or Tribal law." 25 C.F.R. § 286.3. The regulations go on to require that the "Indian ownership must actively participate in the management and operation of the economic enterprise" and that corporations must be at least 51% owned by eligible Indians or Indian Tribes. *Id.* We agree with this recognition by courts and Congress that the identity of those owning and operating a business is pertinent to classification of the entity itself.

Policy considerations also weigh heavily in favor of treating Muddy Creek as a tribal member. Congress' primary objective in Indian law for several decades has been to encourage tribal economic independence and development. By finding that incorporation under state law deprives a business of its Indian identity, we would force economic developers on reservations to forgo the benefits of incorporation in order to maintain their guaranteed protections under federal Indian law. This could hinder economic development. This is particularly unwarranted in the instant case because the Pine Ridge Reservation is the poorest in the country. We therefore reject the Department's contention that Muddy Creek fails the first inquiry under *Chickasaw*.

The next inquiry focuses on whether Muddy Creek bears the legal incidence of the motor fuel tax. The Supreme Court has held that in the absence of dispositive language in the state taxing statute that either identifies who bears the legal incidence of the tax, or a "pass through" provision requiring retailers and distributors to pass the tax to consumers, then "the question is one of 'fair interpretation of the taxing statute as written and applied.'" *Chickasaw,* 515 U.S. at 461, 115 S.Ct. at 2221, 132 L.Ed.2d at 411 (quoting *California Bd. of Equalization v. Chemehuevi Tribe,* 474 U.S. 9, 11, 106 S.Ct. 289, 290, 88 L.Ed.2d 9 (1985)). The Department argues that this statement by the Court provides us with a rule that if the state legislature specifically designates the party upon whom the legal incidence rests, that designation is dispositive and there is no need for inquiry into the statutory structure to determine upon whom it rests. Here, the South Dakota Legislature has provided that the legal incidence of the tax rests upon the consumer. SDCL 10-47B-42 provides, "the legal incidence of the tax falls upon the consumer of the fuel for the privilege of operating vehicles on the roads and highways of the state."

Although one may question the wisdom of permitting a state to determine the entity who bears the legal incidence of a tax by merely making cosmetic changes to a statute, that is what the Court in *Chickasaw* did. The Court found that the legal incidence of Oklahoma's tax fell upon the retailer based upon its analysis of the taxation scheme, but stated, "Oklahoma could accomplish what it here seeks by declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy." *Chickasaw,* 515 U.S. at 460, 115 S.Ct. at 2221, 132 L.Ed.2d at 410. Thus, despite indications in the statute that it may be

the marketer who is ultimately responsible to pay the tax, the legal incidence falls upon the consumer.

The conclusion that the legal incidence of the tax falls upon the consumer does not change our analysis regarding whether the Department may levy this tax. First, the record supports, and the Department apparently does not dispute, that the majority of Muddy Creek's consumers are enrolled members of the Oglala Sioux Tribe residing on the Reservation.

Second, Muddy Creek maintains standing to bring this suit based on the fact that regardless of where the legal incidence falls, Muddy Creek was liable for the tax as it was required to prepay it, even though it passed the tax on to its consumers. As the Supreme Court noted in *Bacchus,* although Muddy Creek may pass the tax on to its consumers, it still must prepay the tax to the State in order to obtain the gasoline. *Bacchus Imports Ltd. v. Dias,* 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). Although *Bacchus* dealt with whether a state tax exemption violated the Commerce Clause, we believe the same standing analysis applies here. Muddy Creek was civilly and criminally liable for the taxes and was wholly responsible for prepayment and it has standing to dispute the legality of the tax. *See* SDCL 10-47B-41; SDCL 10-47B-75; SDCL 10-47B-187.

Finally, the record indicates that Muddy Creek paid South Dakota motor fuel taxes on fuel it purchased for its transport trucks to haul fuel to the filling station at Pine Ridge. To the extent that Muddy Creek was a "consumer" of fuel for use on the reservation, it is entitled to a refund of the South Dakota motor fuel taxes it paid.

Since Muddy Creek does not bear the legal incidence of the tax on the fuel it sold to consumers, by statute, it is therefore not entitled to a refund of all the taxes it has paid since 1995. However, the State is also not entitled to retain this illegally collected tax. The proper parties, namely, Muddy Creek's consumers who were enrolled members of the Oglala Sioux Tribe, are entitled to the bulk of refund.

3. WHETHER THE STATE'S MOTOR FUEL TAXATION SCHEME DEPRIVED MUDDY CREEK OF PROCEDURAL DUE PROCESS.

Muddy Creek argues that it was denied procedural due process because the State did not provide for or allow for a refund claim by Muddy Creek based on the invalidity of the tax. Our holding that Muddy Creek, as a marketer, is not entitled to the refund, partially disposes of this issue because the South Dakota motor fuel taxation scheme allows for a refund claim by a consumer based on the invalidity of the tax. Since Muddy Creek does not bear the legal incidence of the tax as a marketer, it was not the proper party to obtain the refund, except as to the fuel it purchased for its own use on the reservation.

South Dakota's refund statutes allow for a refund to the party who uses the motor fuel, in this case, the consumer, in three instances: 1) when the user is exempt; 2) when the fuel is used off road and 3) when the tax cannot be passed on to the user. SDCL 10-47B-42. Of particular importance in this case is SDCL 10-47B-131.2 which provides:

> A consumer of motor fuel . . . may apply for and obtain a refund of fuel taxes imposed and paid to this

> state, if a state or federal court of final appeals finds that taxation of the purchase or use [of] the fuel is preempted by federal law or unconstitutional.

This statute allows for a refund of illegally collected taxes by the individual or entity that bears the legal incidence of the tax. Since the taxation scheme provides for compensation for the person upon whom the legal incidence falls, there is no due process violation against Muddy Creek as a marketer.

4. WHETHER STATE STATUTES OF LIMITATION BAR A CHALLENGE TO AN ILLEGAL TAX IN THIS CASE.

Muddy Creek raises the issue whether state statutes of limitation operate to prevent refund of an illegal tax. We address the issue because this is an illegal tax and there are reservation Indian consumers who can claim the refund.

When the Department imposed the state motor fuel tax upon gasoline sold by an Indian retailer on an Indian reservation to members of the tribe residing on the reservation, it exceeded its jurisdictional and legal boundaries. This Court has held that if property is outside of the taxing district or it is exempt from taxation, statutes of limitation are rendered inoperative. *Hough v. Perkins County,* 72 S.D. 236, 32 N.W.2d 632, 633-634 (1948). Because the State exceeded its authority in imposing this tax, the limitation periods imposed by the motor fuel taxation scheme are inapplicable in this case.

We agree with the Department that States are permitted to impose reasonable procedural limitations upon the refund of an invalid tax. We also agree that the

underlying justification for such limitations is to protect the "government's strong interest in financial stability" and the State's ability to engage in "sound fiscal planning." *McKesson Corp. v. Division of Alcoholic Beverages,* 496 U.S. 18, 44, 110 S.Ct. 2238, 2254, 110 L.Ed.2d 17, 41. However, those justifications are simply not present in this case. The Department was aware as early as 1994 that Muddy Creek intended to contest these taxes and was presumably aware of the possibility that the taxes might be invalid. The State could have fully prepared for the contingency that it would be liable for a refund of the taxes it was illegally imposing. Under the facts of this case, we hold that the state statutes of limitation regarding refunds for motor fuel taxation are inapplicable. Therefore, we reverse and remand with instructions for the trial court to direct the Department to:

1) Determine the correct amount of the invalid tax (refund) that applies to purchases by Muddy Creek for its use on the reservation.

2) Determine, upon proper application, the correct amount of the invalid tax (refund) that applies to purchases by reservation Indian consumers.

3) Determine related questions, such as prejudgment interest.

RUSCH, Circuit Judge, concurs.

GILBERTSON, Chief Justice, concurs specially.

KONENKAMP, Justice, and AMUNDSON, Retired Justice, concur in part and dissent in part.

RUSCH, Circuit Judge, sitting for ZINTER, Justice, disqualified.

MEIERHENRY, Justice, not having been a member of the Court at the time this action was submitted to the Court, did not participate.

GILBERTSON, Chief Justice (concurring specially).

I join in the Court's opinion. I write specially only to address remand procedures which this Court's decision now authorizes.

One hundred years ago, the United States Supreme Court struck down the first attempt by the State of South Dakota to levy a tax on personal property owed by Indians who resided in Indian country. *United States v. Rickert,* 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903). However, the Court merely struck down the attempted taxation and the subject of refunds was never addressed.

More recent taxation cases between the State and various opponents to its taxation attempts have dealt with the refund issue. Generally, state statutes of limitation such as SDCL 10-47B-141, seeking to limit the time for application of refunds, have not fared well in this context. In *United States ex rel. Cheyenne River Sioux Tribe v. South Dakota,* 105 F.3d 1552 (8thCir.1997), *cert. denied,* 522 U.S. 981, 118 S.Ct. 441, 139 L.Ed.2d 378 (1997), the district court was reversed for not allowing a monetary refund of motor vehicle excise taxes paid by tribal members. The Eighth Circuit reasoned that a refund was appropriate to tribal members if paid under duress when the state's tax was determined to be invalid " 'because it [is] beyond the State's power to impose' or 'because the taxpayers were absolutely immune from the tax.' " *Id.* at 1560 (citing *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 39, 110 S.Ct. 2238, 2251-52, 110 L.Ed.2d 17 (1990)) (additional citations

omitted). Thus, "'the State must 'undo' the unlawful deprivation by refunding the tax previously paid under duress.'" *Id.*

The United States Supreme Court had previously held in *McKesson* that if a taxpayer was absolutely immune from a tax, it would be a violation of the Fourteenth Amendment to allow the State to retain taxes previously paid under duress without any obligation to refund such unlawfully collected taxes. *McKesson,* 496 U.S. 18, 39, 110 S.Ct. 2238, 2251, 110 L.Ed.2d 17 (1990). In reliance upon *McKesson,* the *Cheyenne* Court further refined its ruling by stating that:

> [t]axes that are voluntarily paid because of mistake of law cannot be recovered back, but taxes paid under duress or coercion are recoverable, and state refund procedures do not limit such recovery.

Id. at 1561 (internal citations omitted).

The refund issue again arose in *United States ex rel. Cheyenne River Sioux Tribe v. South Dakota,* 102 F.Supp.2d 1166 (DSD), which was the remand proceeding from the *Cheyenne* Eighth Circuit case. Therein, the district court concluded the excise taxes were paid "'under duress or coercion'" as the "State did not provide a pre-deprivation procedure to challenge the tax and failure to pay the tax subjected tribal members to criminal penalties." *Id.* at 1172. The district court cast aside the State's argument that SDCL 10-59-19 governed the time for allowable refunds in favor of the longer 28 U.S.C. § 2415(a). *Id.* at 1174. However, that decision hinged on the fact the United States was the plaintiff rather than individual Indians seeking refunds. While the door was not completely closed precluding the application of state

statutes of limitation, the district court held that state statutes of limitation may apply to a federal claim which is analogous to a state cause of action only if there is no applicable federal statutes of limitation and the state statutes of limitation "would not be inconsistent with underlying federal policies." *Id.* (citing *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 240-42, 105 S.Ct. 1245, 1254-56, 84 L.Ed.2d 169 (1985)). Therein, the Court applied 28 U.S.C. § 2415(a) because it concluded the State would be unjustly enriched if it were allowed to keep the illegal collection of the excise tax from tribal members. *Cheyenne River,* 102 F.Supp.2d at 1174. *See also United States ex rel. Standing Rock Sioux Tribe v. Janklow,* 103 F.Supp.2d 1146, 1155 (D.S.D.2000).

Thus upon remand, the trial court in this case should determine whether those tribal members[5] paid under coercion and duress and thus are entitled to be considered for a refund. That will also affect whether SDCL 10-47B-131.2 can stand as a valid statute of limitation. If those legal matters are resolved in favor of the tribal members, the trial court should proceed to resolve evidentiary matters concerning the individual claims.

KONENKAMP, Justice (concurring in part and dissenting in part).

I agree that SDCL 10-47B-131.2 permits "consumers" to apply for and obtain a refund of motor fuel taxes if a court finds, as we have, that taxation is preempted by federal law. Consumer claimants have not yet made a

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[5] The immunity from tax does not extend to Indians who are members of a different tribe. *Cheyenne River,* 105 F.3d at 1559.

claim, of course, and, if they do, the question of the statute of limitations should be decided then. Today's decision impugns the wise principle that courts must await whatever controversies may arise and decline to reach disputes not before them. The only claim before us is the one sought by Muddy Creek.

All refund claims that Muddy Creek submitted before December 17, 1997 are untimely. SDCL 10-47B-141 limits the time a claimant can obtain a motor fuel tax refund to fifteen months:

> Any claim for refund of motor fuel or special fuel tax shall be received by the department within fifteen months of the date the fuel was originally purchased in order to be accepted for refund. Fuel purchased more than fifteen months from the date the claim is received is forever barred from refund eligibility.

The only valid refund Muddy Creek is entitled to is the one for tax paid on its own use of motor fuel on the reservation for the period of December 17, 1997 through December 1999. That period is the one for which Muddy Creek made a timely demand. All prior claims are foreclosed in accord with SDCL 10-47B-141 and are "forever barred from refund eligibility."

Nonetheless, the Court bypasses this statute, throwing open the State's treasury not only to Muddy Creek's claims but to all claims to be made in the future by consumers, without regard to any time limitation. This Court has neither the right nor the justification to initiate its own administrative proceedings on behalf of these consumers in order to prejudge the future timeliness of their claims for tax relief against the State. The controversy is not ripe for decision because we do not know how far back

claims will be made by consumers or how long in the future the right to make those claims will or should remain open.

The Court relies on the decision of *Hough v. Perkins County,* 72 S.D. 236, 32 N.W.2d 632, 633 (1948) to declare that South Dakota's fifteen month limitations period for seeking a refund on motor fuel tax is "inoperative" and thus "the limitation periods imposed by the motor fuel taxation scheme are inapplicable in this case." But, for the record, *Hough* had nothing to do with tax refunds. And that case upheld the statute of limitations. At best, *Hough* only stands for the proposition that certain defects in a tax deed are jurisdictional against which a statute of limitations is necessarily inoperative. *See also Cornelius (Lynch, Intervener) v. Ferguson,* 23 S.D. 187, 121 N.W. 91, 93. *Hough* follows a long line of South Dakota cases standing for the rule that persons cannot be deprived of their real property through the sale of a tax deed if the defects in the process of obtaining the deed are so serious as to deprive owners of their property without due process of law. Here, with respect to refunds on motor fuel tax, South Dakota taxpayers have not been deprived of due process. They have a right to seek a refund within a reasonable time.

All in all, the holding in *Hough* is very different from today's fiat declaring that the State cannot set a reasonable limit on a motor fuel tax refund claim. On the contrary, the United States Supreme Court has specifically authorized reasonable procedural limitations, including "relatively short statutes of limitation" applicable to tax refund claims. *McKesson Corp. v. Division of Alcoholic Beverages,* 496 U.S. 18, 45, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). The Supreme Court acknowledged this vital issue in dealing with tax refunds, endorsing a State's "exceedingly strong interest in financial stability." *Id.* at 37, 110

S.Ct. 2238. Granted, there is an element of injustice in cutting off the right to seek tax refunds for taxes illegally collected. But statutes of limitations always cut off what may otherwise be just claims. They balance the right to redress against the specter of endless liability. In tax refund cases, to deny such limitations would devastate the State's budgetary planning process.

Since the issue of future consumer claims was never briefed or decided at any level in these proceedings, the matter is simply not appropriate for decision. As Learned Hand would counsel, a court should move cautiously before taking so drastic a step as to prejudge a controversy not before it. Therefore, I concur on Issues 1 and 2, but dissent on Issues 3 and 4.

AMUNDSON, Retired Justice, joins this special writing.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	SS.	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

LOREN POURIER,
d/b/a MUDDY CREEK OIL
AND GAS, INC., and
MUDDY CREEK OIL
AND GAS, INC.

v.

SOUTH DAKOTA
DEPARTMENT OF
REVENUE

CIV. NO. 99-196

JUDGMENT OF
AFFIRMANCE

This matter having come before the Court, the Honorable Steven L. Zinter, Circuit Court Judge, on October 17, 2001, at 1:30 o'clock p.m., for argument on the Appellants' Appeal to this Court dated May 25, 2001, of the Final Decision of the Secretary of the South Dakota Department of Revenue, dated April 25, 2001; with the Appellants being represented by Philip N. Hogen, Attorney at Law, and the Appellee being represented by Lawrence E. Long, Chief Deputy Attorney General for the State of South Dakota, and with the Court having heard the arguments of counsel, and being fully advised therein, and with the Court having rendered an oral decision at the close of the hearing, with a copy of the transcript of the Court's oral decision attached hereto and incorporated by this reference, it is hereby

ORDERED, ADJUDGED AND DECREED that the final decision of the Secretary of the South Dakota Department of Revenue, dated April 25, 2001, is hereby affirmed.

Dated this 24th day of October, 2001.

BY THE COURT:

/s/ Steven L. Zinter
HONORABLE STEVEN L. ZINTER
CIRCUIT COURT JUDGE

ATTEST:
/s/ Mary L. Erickson by
Sharon McEntaffer, Deputy
Clerk of Courts

(SEAL)

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
) SS		
COUNTY OF HUGHES)		SIXTH JUDICIAL CIRCUIT

* *

LOREN POURIER, d/b/a MUDDY CREEK OIL AND GAS, INC., and MUDDY CREEK OIL AND GAS, INC.,	*	CIV. NO. 99-196
Plaintiffs and Appellants,	*	TRANSCRIPT OF BENCH DECISION
-vs-	*	
SOUTH DAKOTA DEPARTMENT OF REVENUE,	*	
Defendant and Appellee.	*	

* *

BEFORE: THE HONORABLE STEVEN L. ZINTER
Presiding Circuit Judge of the Sixth Judicial Circuit, Pierre, South Dakota, on October 17, 2001.

* * * * * * * * * *

APPEARANCES:

Counsel for Appellants: PHILIP N. HOGEN, ESQ.
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Rapid City, South Dakota 57702

Counsel for Appellee: LAWRENCE E. LONG, ESQ.
Chief Deputy Attorney General
500 East Capitol
Pierre, South Dakota 57501-5070

THE COURT: All right. The question before the Court today involves a number of marketer refund claims all relating to the taxation of motor fuel that is ultimately

sold on the Pine Ridge Indian Reservation. Muddy Creek is a South Dakota corporation. The sole stockholder, Mr. Pourier, is an enrolled member of the Oglala Sioux Tribe.

The question which is dispositive is whether or not the Hayden-Cartwright Act expressly authorizes the collection of motor fuel tax on an Indian reservation, and although the standard of review has been stated a number of different ways, it's clear that in order for the tax to be authorized, it has to be in some manner clearly expressed – I should say it has to be a clearly expressed congressional authorization.

Now, in my judgment, this Act contains such clearly expressed congressional authorization to tax motor fuels on an Indian reservation. First, it is highly significant that Section 104's language includes express reference to licensed traders and other reservations. The United States Supreme Court has not said that you must not look at legislative history in examining statutory language. In fact, it said to the contrary, that you can to determine congressional intent. And I'm fully cognizant and aware of the rules of statutory construction that generally statutory construction is only used when there's an ambiguity, but that doesn't mean, and the U.S. Supreme Court has clearly said, that you can – you still may look to legislative history in determining what Congress intended.

Here, the reference to licensed traders is particularly suggestive of Indian reservations especially in light of the contemporaneous debate and discussions of that era of American history. The congressional debates clearly reflect and refer to Indian traders as licensed traders. The federal regulations refer to Indian traders. Moreover, the Attorney General and the Solicitor rendered opinions concerning

the interpretation of these phrases – these operative phrases and concluded that Indian reservations were within the meaning of the Act.

Notwithstanding those opinions, Congress failed to amend Section 104, although it did amend Section 105 and 106 to exclude taxation of Indians in other areas. In my judgment, the contemporaneous legislative history surrounding these operative words "other reservations" and "licensed traders" clearly show that Congress intended to cover Indian reservations.

Frankly, I can find no other clearly expressed intent in the history surrounding – in all of the history surrounding this Act as well as the Buck Act. Now, additionally, I think it's highly significant that numerous state and federal cases decided at this time refer to licensed traders in the context of Indian affairs. No federal cases decided before 1936 use licensed traders in a context other than in Indian affairs. And it appears ultimately clear to me that this had become an Indian law term of art.

Moreover, this Court is bound to apply precedent of the South Dakota Supreme Court. In the *A.G.E.* case, the South Dakota Supreme Court clearly and unmistakably held that the Hayden-Cartwright Act authorized – that the Hayden-Cartwright Act was a federal statute which specifically authorized the State to tax the use or sale of gasoline on the Pine Ridge Indian Reservation, which is the dispositive issue today. I believe – I agree, I should say, with the State's observation that I'm bound to follow that precedent until such time as the South Dakota Supreme Court reverses it.

I would finally note that although we've discussed at great length today the *Goodman Oil* case, I don't believe

that it is persuasive authority. First of all, *Goodman* in my judgment draws the incorrect – draws an incorrect view of the contemporaneous understanding of a reservation at the time the Hayden-Cartwright Act and the Buck Act were passed. The *Goodman* decision in my judgment also inaccurately ascribed significance to the presence or absence of an Indian in the *A.G.E.* case.

In my judgment, *Goodman* is also not persuasive because the *Goodman* Court I think applied the wrong test to the State. In order for the *Goodman* Court to buy into the argument about the specialized meaning of licensed traders and reservations, they would require the State to "prove that there were no other distributors or sellers of goods that are required to be licensed." That's clearly the basis for their rejection of the taxing authority's arguments in that case. That's – that's the – that's the wrong test.

The question is not whether there may be some other hypothetical distributors or sellers of goods that are required to be licensed. The question is whether or not Congress intended that the reference to licensed traders and other reservations in fact meant to include taxation on Indian reservations. And as I previously indicated, contemporaneous history and case law at this point in time all clearly reflect a recognition and acknowledgment that those terms did relate to transactions on Indian reservations.

I think *Goodman* also incorrectly relies on a post-1936 case to determine the meaning of the 1936 legislation, and finally, mistakenly relies on inappropriate language used in the *Falls City Brewing* case.

So in summary, and for whatever it's worth, in my opinion, in my judgment, when you read the language of the Hayden-Cartwright and the Buck Acts and when you read how the terms "licensed traders" and "reservations" were used in the case law at that time, when you look at the legislative history of the Hayden-Cartwright Act and the Buck Act, when you look at the executive interpretations of the Hayden-Cartwright Act immediately after it was passed, in my judgment, all those factors clearly and unequivocally reflect Congress' intent to authorize a motor fuel tax on the reservations.

Now, Muddy Creek has also raised a – some constitutional arguments, particularly the *Quill Corporation* nexus argument and the Commerce Clause – both the Interstate Commerce Clause and the Indian Commerce Clause arguments. First of all, it appears to me that those constitutional provisions are not violated when Congress specifically authorized the transaction at issue.

However, even if I'm incorrect in that statement, the nexus was clearly here. We're dealing with a South Dakota corporation, a tax – a South Dakota corporation that's seeking the refund. We're dealing with a tax imposed on consumers who are using fuels in Shannon and Jackson County of South Dakota. Now, I acknowledge that that is also the Pine Ridge Indian Reservation, but in my judgment, that does not mean that Shannon and Jackson County are not a part of South Dakota. This tax is only imposed on fuel sold in South Dakota. As a consequence, there is no violation of the Commerce Clause, the Due Process Clause – or the Due Process Clause because the transactional and taxpayer nexus is satisfied. And again it seems to me that the Indian Commerce Clause issues are

resolved by the – the fact that Congress, in my judgment anyway, has specifically authorized the tax.

In light of the Court's ruling on those issues, I need not reach the other issues and for those reasons I'm going to affirm.

Mr. Long, you should prepare a judgment of affirmance. Any questions?

MR. HOGEN: No questions, your Honor.

THE COURT: Thank you.

MR. LONG: None, your Honor. Thank you.

THE COURT: We'll be in recess.

(Conclusion of Bench Decision.)

SOUTH DAKOTA
DEPARTMENT OF REVENUE

LOREN POURIER, d/b/a MUDDY CREEK OIL AND GAS, INC., and MUDDY CREEK OIL AND GAS, INC.

FINAL DECISION
REV 99-36

After reviewing the record and the proposed decision of the Hearing Examiner in this matter,

IT IS HEREBY ORDERED that pursuant to SDCL 1-26D-6 of the Hearing Examiner's proposed decision dated April 5, 2001 is adopted in full.

IT IS FURTHER ORDERED that the claims of refund of motor fuel tax made by Muddy Creek for any period of time prior to December 17, 1997 be dismissed. The Hayden-Cartwright Act, 4 USC § 104 expressly authorizes the collection of state motor fuel taxes upon the Pine Ridge Indian reservation. The denial of any marketer refund claims for the period of December 17, 1997 through December 31, 1999 by the Secretary of Revenue is affirmed.

Parties are hereby advised of the right to further appeal the final decision to circuit court within thirty (30) days of receiving such decision pursuant to the authority of SDCL 1-26.

Dated April 25, 2001

/s/ Gary R. Viken
Gary R. Viken, Secretary

SOUTH DAKOTA
OFFICE OF HEARING EXAMINERS

LOREN POURIER, d/b/a MUDDY CREEK OIL AND GAS, INC., and MUDDY CREEK OIL AND GAS, INC.

V.

DEPARTMENT OF REVENUE

PROPOSED DECISION
REV. 99-36

An administrative hearing in the above matter was held on February 3-4, 2000. Philip N. Hogen and Jonathan A. Greenburg appeared as counsel for the Petitioner, Loren Pourier, owner of Muddy Creek Oil and Gas, Inc. (Loren Pourier, Muddy Creek's corporate president will hereinafter sometimes be referred to as "Pourier" and Muddy Creek Oil and Gas, Inc. will hereinafter sometimes be referred to as Muddy Creek"). Lawrence E. Long, Chief Deputy Attorney General and Mr. David D. Wiest, Assistant Attorney General for the South Dakota Department of Revenue appeared on behalf of the Department of Revenue (hereinafter sometimes referred to as "Department" or "DOR"). TR refers to the transcript from the hearing on February 3-4, 2000. Ex. plus the number refers to the exhibits offered at the hearing.

ISSUES

1. Whether the Hearing Examiner has jurisdiction to consider any claim for refund of motor fuel tax made by Muddy Creek for any period prior to December 17, 1997.

2. Whether the Hayden-Cartwright Act, 4 U.S.C. §104, expressly authorizes the State of South Dakota to collect its motor fuel tax upon sales of motor fuels within

the boundaries of the Pine Ridge Indian Reservation in South Dakota.

3. Whether Muddy Creek can claim a refund of motor fuel tax where the legal incidence of the motor fuel tax falls on the consumer pursuant to SDCL 10-47B-42, not Muddy Creek.

4. Whether Muddy Creek is precluded from seeking a refund for motor fuel tax pursuant to SDCL 10-47B-131.2 because the legal incidence of the motor fuel tax is upon the consumer, not Muddy Creek.

5. Whether Muddy Creek may retain any refund of motor fuel tax where Muddy Creek does not bear either the legal or economic incidence of the motor fuel tax.

STATEMENT OF THE CASE

This case is an appeal of a denial of a request for a refund of motor fuel tax. Muddy Creek filed a marketer refund claim dated March 16, 1999, for the period of December 17, 1997 through September, 1998, inclusive. Ex. 19; Ex. D, p. 1;[1] TR 173. That claim was denied by the DOR on April 6, 1999. Ex. D, p. 26. Muddy Creek also filed a marketer refund claim dated March 31, 1999, for the month of February, 1999. Ex. 21; Ex. D, p. 22; TR 179. That claim was denied by the DOR on April 14, 1999, as corrected on April 19, 1999. Ex. D, p. 27 and 28. Muddy Creek also filed a marketer refund claim dated April 21, 1999, for the month of March, 1999. Ex. 22; Ex. D, p. 29;

[1] The reference to page numbers in Exhibit D is a reference to the record certified to the Circuit Court pursuant to SDCL 1-26-33.

TR 179-80. That claim for refund was denied by the DOR on May 26, 1999. Ex. D, p. 40.[2]

Muddy Creek responded by filing in Circuit Court an Objection to Collection and Retention of Excise Tax and Notice of Appeal dated and served May 4, 1999. Ex. AA, Ex. BB. Muddy Creek also filed in Circuit Court a Statement of Issues dated May 14, 1999. Ex. CC.

A hearing on the Objection to Collection and Retention of Excise Tax and Notice of Appeal was held before the Honorable Steven L. Zinter, Circuit Court Judge, on September 7, 1999 (Loren Pourier, d/b/a Muddy Creek Oil and Gas, Inc., and Muddy Creek Oil and Gas, Inc. v. South Dakota Department of Revenue, Hughes County Civil No. 99-196).

After hearing oral argument, Judge Zinter orally ordered the case remanded for development of a factual record. Transcript of Oral Argument, p. 53-55. The oral decision was followed by a written Order dated September 14, 1999, remanding the matter back to the Department of Revenue for full consideration of the claims of Muddy

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[2] Muddy Creek also filed a marketer refund claim dated March 31, 1999, for the period of October, 1998, through January, 1999. Ex. 20; TR 176. Although the DOR received this marketer refund claim, as shown by the certified mail return receipt found at the end of Exhibit 20, TR 177, the DOR did not make a specific denial of this claim. All claims, however, were specifically denied at the administrative hearing. TR 347.

While the DOR has been unable to locate the marketer refund claim Exhibit 20 in its files, TR 349, the DOR will not contest the fact that it was received.

Creek and Pourier. Ex. D. This matter had not previously been heard in an administrative hearing.

On remand, a hearing was held on February 3-4, 2000, before the Hearing Officer. After hearing, the Hearing Officer ordered the parties to submit simultaneous briefs and reply briefs.

EVIDENTIARY RULINGS

Several matters regarding the admissibility of evidence were taken under advisement at the time of the hearing. Those items will be addressed seriatim:

> **EXHIBIT 50 – 2000 Survey of Muddy Creek Customers.** The Department objected to the survey on the grounds of hearsay. This hearing examiner admits Exhibit 50. However, little weight was given to the results of the survey as this was an unscientific survey (poll) and this examiner questions its reliability.
>
> **EXHIBIT 73 – BIA Labor Report on Indian Labor.** The Department objected to the report admission on the grounds of relevancy. This hearing examiner overrules the Department's objection and admits Exhibit 73.

FINDINGS OF FACT

I.

Muddy Creek is a corporation organized under the laws of South Dakota (TR 74-75).

II.

Muddy Creek's sole stockholder since 1993 is Loren Pourier (TR 75).

III.

Loren Pourier is an enrolled member of the Oglala Sioux Tribe, with a blood quantum of 11/32nds. He and his family currently reside in Kyle, South Dakota. Kyle is near the center of the Pine Ridge Reservation.

IV.

Muddy Creek Oil and Gas, Inc. owns four convenience stores. At issue in this matter is the convenience store in Pine Ridge, South Dakota called Big Bat's Texaco.

V.

Patty Pourier is the secretary of the Muddy Creek Corporation and is in charge of the bookkeeping for the businesses (TR 126).

VI.

Muddy Creek does not hold a federal trader's license (TR 77-78).

VII.

Mr. Pourier is aware of the concept of federal trader's licenses (TR 77-78).

VIII.

Muddy Creek possesses a permit from the Oglala Sioux Tribe to conduct business on the Pine Ridge Indian Reservation (Ex. 68, TR 27).

IX.

Muddy Creek possesses a tribal sales tax license (TR 27).

X.

Muddy Creek is licensed by South Dakota as a fuel importer, exporter, marketer, and transporter. These licenses were issued to the Muddy Creek Corporation (Ex. 65, TR 27, 74 and 344).

XI.

Since obtaining the fuel importer's license, Muddy Creek has at all times remitted monthly returns and paid state motor fuel import taxes.

XII.

Muddy Creek obtains the fuel it sells at it's Pine Ridge store from pipeline terminals in Nebraska (TR 29, 31, 79, 93).

XIII.

Muddy Creek hauls its own fuel to its convenience stores via tankers which are owned by Pourier.

XIV.

The marketer refund claims at issue in this matter were made by the Muddy Creek Corporation.

XV.

Muddy Creek's price at the pump includes South Dakota's $.22 per gallon fuel tax.

XVI.

Any additional Findings of Fact included in the Reasoning section of this decision are incorporated herein by reference.

XVII.

To the Extent any of the foregoing are improperly designated and are, instead, Conclusions of Law, they are hereby redesignated and incorporated herein as Conclusions of Law.

REASONING

Whether the Hearing Examiner has jurisdiction to consider any claim for refund of motor fuel tax made by Muddy Creek for any period prior to December 17, 1997.

This hearing concerns the application for marketer refund claims by Muddy Creek. At this point it is warranted to include a timeline of the Muddy Creek claims as set forth in the Department's brief. The history is as follows:

a. Muddy Creek filed an application for motor fuel and special fuel licenses, pursuant to SDCL 10-47A,[3] on June 21, 1995. Ex. 75. Pourier later individually filed for the same licenses. Ex. 75. On July 21, 1995, the DOR denied Muddy Creek's license application. Ex. 75. An administrative hearing was held on October 5, 1995, with a Proposed Decision dated October 30, 1995. Ex. 75. The final Decision was issued on November 13, 1995. Ex. 75. Muddy Creek received motor fuel and special fuel licenses on November 22, 1995. TR 155; See also Ex. 32.[4]

b. Muddy Creek and Pourier filed a Notice of Claim dated January 19, 1996. Ex. 13; TR 165-66. The Notice of Claim was filed pursuant to SDCL ch. 3-21. The Notice of Claim was a claim for damages for the period of July 21, 1995 through November 22, 1995. Ex. 13.

c. Muddy Creek filed a Refund Claim dated August 21, 1996. Ex. 14; TR 167. The Refund Claim covered the period of July 22, 1995, through December, 1995. Ex. 14. The Refund Claim made reference to arguments

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[3] SDCL ch. 10-47A was repealed by 1995 S.D. Sess. Laws ch. 71, § 186, effective January 1, 1996. It was replaced by SDCL ch. 10-47B.

[4] Muddy Creek was represented by Mr. Philip Hogen in 1995. Ex. 75. Muddy Creek has since been represented by Mr. Thomas Stanton, Exhibit 13, TR 36, 232, Mr. Steven Johnson, Exhibits C and 14, Mr. Russell Janklow, Janklow Deposition, TR 36, Mr. Rick Johnson, Exhibit AA, and is currently again represented by Mr. Hogen. There was also mention of the Gunderson, Palmer Law Firm of Rapid City. Janklow Deposition, p. 23.

and authorities provided by Mr. Steven M. Johnson, Muddy Creek's attorney at that time. Ex. 14.

d. On September 3, 1996, South Dakota Department of Revenue Secretary Gary R. Viken wrote a letter to Mr. Steven M. Johnson, Muddy Creek's attorney at that time. Ex. C; Janklow Deposition Ex. 18. Secretary Viken's letter made reference to the Refund Claim made by Muddy Creek in August, 1996, and stated "we must respectfully deny your request for a refund." Ex. C; TR 234. Muddy Creek's corporate officers, and Pourier, all acknowledged being told about Secretary Viken's September 3, 1996 letter, and/or receiving a copy of the letter. TR 70, 104, 223, 233. Russell Janklow testified by trial deposition that he sent a copy of the September 3, 1996, letter to his clients. Janklow Deposition, p. 28-29.

e. Muddy Creek filed a marketer refund claim dated March 16, 1999. Ex. 19; Ex. D, p. 1. The marketer refund claim covers the period of December 17, 1997, through September, 1998. TR 173; Ex. 19; Ex. D, p. 1-21, inclusive.

f. Donald W. Hageman, an attorney for the DOR, wrote an April 6, 1999, letter to Muddy Creek and Pourier. Ex. D, p. 26. The April 6, 1999, letter denied Muddy Creek's March 16, 1999 marketer refund claim. Ex. D, p. 26. The marketer refund claim denied is Exhibit 19 in this record.

g. Muddy Creek filed a marketer refund claim dated March 31, 1999. Ex. 21; Ex. D, p. 22.

The marketer refund claim covered the period of February, 1999. TR 179; Ex. 21; Ex. D, p. 22-25, inclusive.

h. Donald W. Hageman, an attorney for the DOR, wrote an April 14, 1999, letter to Muddy Creek and Pourier. Ex. D, p. 27. The April 14, 1999, letter denied Muddy Creek's March 31, 1999 marketer refund claim. Ex. D, p. 27. Mr. Hageman wrote an April 19, 1999, letter to Muddy Creek and Pourier, correcting a date and an amount in the April 14, 1999 letter. Ex. D, p. 28. The marketer refund claim denied is Exhibit 21 in this record.

i. Muddy Creek filed a marketer refund claim dated April 21, 1999. Ex. 22; Ex. D, p. 29. The marketer refund claim covered the period of March, 1999. TR 179; Ex. 22; Ex. D, p. 29-34, inclusive.

j. Donald W. Hageman, an attorney for the DOR, wrote a May 26, 1999, letter to Mr. Rick Johnson, the attorney for Muddy Creek at the time. Ex. D, p. 40. The May 26, 1999, letter denied Muddy Creek's April 21, 1999 marketer refund claim. Ex. D, p. 40. The marketer refund claim denied is Exhibit 22 in this record.

k. Muddy Creek has filed additional marketer refund claims as follows:

    1. Dated March 31, 1999, for period of October, 1998 through January, 1999. Ex. 20; TR 176.

    2. Dated May 30, 1999, for the period of April, 1999. Ex. 23; TR 179.

3. Dated June 21, 1999, for the period of May, 1999. Ex. 24; TR 176.

4. Dated July 30, 1999, for the period of June, 1999. Ex. 25; TR 176.

5. Dated August 20, 1999, for the period July, 1999. Ex. 26; TR 176.

6. Undated (September, 1999), for the period August, 1999. Ex. 27; TR 176, 181.

7. Undated (October, 1999), for the period September, 1999. Ex. 28; TR 176, 181.

8. Undated (November, 1999), for the period October, 1999. Ex. 29; TR 176, 181-82.

9. Undated (December, 1999), for the period November, 1999. Ex. 30; TR 176, 182.

10. Dated January 29, 2000, for the period of December, 1999. Ex. 31; TR 176, 182.

l. Muddy Creek and Pourier filed an Objection to Collection and Retention of Excise Tax and Notice of Appeal dated May 4, 1999, in Circuit Court under the caption of Loren Pourier, d/b/a Muddy Creek Oil and Gas, Inc., and Muddy Creek Oil and Gas, Inc., v. South Dakota Department of Revenue, Hughes County Civil Number 99-196. Ex. AA.

m. Muddy Creek and Pourier filed a Statement of Issues dated May 14, 1999, in Circuit

Court under the caption of Loren Pourier, d/b/a Muddy Creek Oil and Gas, Inc., and Muddy Creek Oil and Gas, Inc., v. South Dakota Department of Revenue, Hughes County Civil Number 99-196. Ex. CC.

n. Oral argument was held in the Circuit Court before the Honorable Steven L. Zinter, Circuit Court Judge, on September 7, 1999, in the case titled Loren Pourier, d/b/a Muddy Creek Oil and Gas, Inc., and Muddy Creek Oil and Gas, Inc., v. South Dakota Department of Revenue, Hughes County Civil Number 99-196. A transcript of the oral argument is part of this record. At the close of the hearing, Judge Zinter orally remanded the matter back to the DOR for further proceedings. Transcript of Oral Argument, p. 53-55.

o. The Circuit Court, the Honorable Steven L. Zinter, Circuit Court Judge, entered an Order dated September 14, 1999, in the case titled Loren Pourier, d/b/a Muddy Creek Oil and Gas, Inc., and Muddy Creek Oil and Gas, Inc. v. South Dakota Department of Revenue, Hughes County Civil Number 99-196, in which Judge Zinter remanded this matter back to the Department of Revenue for a full consideration of Muddy Creek and Pourier's claims. Ex. D. It is Judge Zinter's September 14, 1999, Order which caused this proceeding to be referred to the Office of Hearing Examiners.

p. Muddy Creek filed a marketer refund claim dated January 18, 2000. Ex. 16. The marketer refund claim covered the period of January, 1996 through June, 1996. Ex. 16;

TR 169. The marketer refund claim was filed on or about January 18, 2000. TR 170. No previous claim was filed for that time period. TR 170.

q. Muddy Creek filed a marketer refund claim dated January 18, 2000. Ex. 17. The marketer refund claim covered the period of July, 1996 through April, 1997. Ex. 17; TR 171. The marketer refund claim was filed on or about January 18, 2000. TR 172. No previous claim was filed for that time period. TR 172.

r. Muddy Creek filed a marketer refund claim dated January 18, 2000. Ex. 18. The marketer refund claim covered the period of May, 1997 through December 16, 1997. Ex. 18; TR 172. The marketer refund claim was filed on or about January 18, 2000. TR 172. No previous claim was filed for that time period.

s. A hearing was held before the Hearing Officer on February 3-4, 2000.

Muddy Creek filed a Notice of Claim on January 19, 1996. This Notice of Claim was for damages for the period from July 21, 1995 through November 22, 1995. The above dates included the time period from when Muddy Creek filed an application for a motor fuel and special fuel license (July 21, 1995) and the time they were granted the license on November 22, 1995. Muddy Creek's notice of claim does not appear to have been responded to by any state governmental entity. Pursuant to SDCL 3-21-6 if the claim isn't accepted or rejected within ninety days, the claim is deemed rejected. It has been more than one year since the Notice and no action has been commenced by Muddy

Creek. Action on any claim on contract or tort against the state shall be commenced within one year after same has arisen (SDCL 21-32-2).

The Notice of Claim dated January 19, 1996 is not viable here and Muddy Creek may not base its refund request upon it.

Secondly, Muddy Creek filed a refund claim dated August 21, 1996. This claim covered the time period from July 22, 1995 through December 1995. SDCL 10-59, specifically SDCL 10-59-1 and SDCL 10-59-17, contain the controlling statutes for fuel tax refunds. This is an action for a refund filed pursuant to SDCL 10-59-17 that reads as follows:

> A taxpayer seeking recovery of tax, penalty or interest imposed by the chapters set out in § 10-59-1 shall follow the procedure established in this chapter. No court has jurisdiction of a suit to recover such taxes, penalty or interest unless the taxpayer seeking the recovery of tax complies with the provisions of this chapter.

The Secretary denied the request for a refund in correspondence dated September 3, 1996. Pursuant to SDCL 10-59-22, "[T]he secretary shall determine the amount of any tax overpayment recoverable by a taxpayer." The Secretary's decision is, for purposes of judicial review, a final decision. The remedy for Muddy Creek at that time was to request an administrative hearing for review of the Secretary's ruling (SDCL 10-59-22, SDCL 1-26-30). This request for review is to take place within thirty days (SDCL 1-26-31).

There is no evidence of an appeal to the ruling of Secretary Viken being filed by Muddy Creek within thirty days of his decision. There was an Objection to Collection and Retention

of Excise Tax and Notice of Appeal that was filed by Muddy Creek on May 5, 1999. Unfortunately, this is outside of the time limits as set forth above. "The taking of an appeal within the time fixed for the purpose is jurisdictional in nature." *Kulesa v. Department of Public Safety*, 278 NW2d 637, 638 (SD 1979). This hearing examiner has no jurisdiction to reach the merits of this claim.

Thirdly, we will discuss the three marketer refund claims filed on or about January 18, 2000. These three refund claims cover the time period from January 1996 through December 16, 1997 (Ex. 16, 17 and 18). These claims are governed by SDCL 10-47B-141 which read as follows:

> Any claim for refund of motor fuel or special fuel tax shall be received by the department within fifteen months of the date the fuel was originally purchased in order to be accepted for refund. *Fuel purchased more than fifteen months from the date the claim is received is forever barred from refund eligibility*. (Emphasis added)

SDCL 10-47B-141 was enacted by the legislature specifically for fuel taxes. " . . . [s]pecific terms in one statute prevail over the general terms of another statute." *Canal Insurance Company v. Abraham*, 1999 SD 90, ¶21, 598 NW2d 512, 518.

Furthermore, notice of this fifteen month limitation is found on the bottom of every marketer refund claim form as follows: "NOTE: Refunds are limited to a period within 15 months of transaction date." The above three claims were not filed in a timely manner and this examiner does not have jurisdiction to consider them.

Among other things, Muddy Creek wants to argue that the motor fuel tax system in South Dakota is in violation of

the United States Constitution. All issues involved in this hearing have been well briefed by the parties. However, neither the Department nor the Office of Hearing Examiners has the authority to determine the constitutionality of this taxing scheme. Administrative agencies have only the adjudicatory jurisdiction granted them by statute. *Johnson v. Kolman*, 412 NW2d 109 (S.D. 1987). Questions regarding the constitutionality of statutes or the constitutionality of the application of statutes to a given factual situation such as is argued in this case are matters for the courts. *See, e.g., First Bank of Buffalo v. Conrad*, 350 NW2d 580 (N.D. 1984), *Universal AM-CAN Ltd. V. Attorney General*, 494 NW2d [787] (Mich.App. 1992). That issue is therefore reserved for determination by the circuit court.

Based on the above, this Hearing Examiner only has jurisdiction to rule on the merits of the claims which were made for the time period of December 17, 1997 through December 13, 1999 (*See, Claggett v. Department of Revenue*, 464 NW2d 212, 214 (SD 1990). All other claims made by Muddy Creek are dismissed.

> **Whether the Hayden-Cartwright Act, 4 U.S.C. §104, expressly authorizes the Sate [sic] of South Dakota to collect its motor fuel tax upon sales of motor fuels within the boundaries of the Pine Ridge Indian Reservation in South Dakota.**

The general rule is that when state taxes which fall upon an Indian Tribe or its members within Indian Country, its members cannot be forced to withstand the legal incidence of the state tax without clearly expressed congressional authorization. Within Indian Country set aside for a particular tribe, it and its members may not be forced to bear the legal incidence of a state tax absent clearly

expressed congressional authorization. Outside Indian Country, however, tribes and their members are subject to otherwise nondiscriminatory state taxes unless Congress explicitly has immunized them from such taxation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). "Absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities." *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 128 (1993).

Federal law preempts state laws unless Congress has consented to the application of the tax:

> But when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, "a more categorical approach: '[A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians. . . .

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (quoting *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258 (1992)).

The Department argues, and this examiner agrees, that the Hayden-Cartwright Act, 4 U.S.C. § 104, grants this express congressional authorization to the State of South Dakota to collect its motor fuel tax upon sales of motor fuels within the boundaries of the Pine Ridge Indian Reservation in South Dakota. The Hayden-Cartwright Act reads as follows:

4 U.S.C. § 104. Tax on motor fuel sold on military or other reservation[;] reports to State taxing authority

(a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, **filling stations, licensed traders,** and other similar agencies, **located on United States military or other reservations**, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.

(c) As used in this section, the term "Territory" shall include Guam.

(Emphasis added.) *See*, Act of June 16, 1936, Pub. L. No. 74-686, § 10, 49 Stat. 1519, 1521-22 (1936) (codified as amended at 4 U.S.C. § 104).

The Department argues that "reservation" as used in the Hayden-Cartwright Act includes Indian reservations. Furthermore, the Department argues that Mr. Pourier is a licensed trader within that reservation.

Black's Law Dictionary 1175 (5th ed. 1979) defines reservation as follows:

> A reservation is a tract of land, more or less considerable in extent, which is by public authority withdrawn from sale or settlement, and appropriated to specific public uses; such as parks, military posts, Indian lands, etc. A tract of land (under control of the Bureau of Indian Affairs) to which an American Indian tribe retains its original title to ownership or which has been set aside for its use out of the public domain.

American Heritage Dictionary 1051 (Second College ed. 1991) defines reservation as "A tract of land set apart by the Federal government for a special purpose, esp. one for the use of an American Indian people or tribe."

The Department contends that Indian reservations were included in the drafters thoughts based upon the inclusion of the term "licensed trader" in the body of the Hayden-Cartwright Act, "when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on US military or other reservations. . . ." (4 USC §104(a)).

The argument set forth by the Department in its post-hearing brief regarding the licensed trader is succinct and to the point. It is adopted by this examiner and set forth in a footnote below.[5]

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[5] A crucial term in the Hayden-Cartwright Act is "licensed traders." Congress has, pursuant to its plenary power to regulate commerce with the Indian tribes, required Indian traders to obtain licenses since 1790. Act of July 22, 1790, 1 Stat. 137 (1790). The Supreme Court has observed that the United States

> has promulgated detailed regulations prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed; penalties for acting as a trader without a license; conditions under which government employees may trade with Indians; articles that cannot be sold to Indians; and conduct forbidden on a *licensed trader's* premises.

Warren Trading Post Company v. Arizona Tax Commission, 380 U.S. 685, 689 (1965) (emphasis added). By 1936, the year 4 U.S.C. § 104 was first enacted, the term "licensed traders" had been connected with United States Indian affairs for 146 years. Act of July 22, 1790, 1 Stat. 137 (1790). It is little wonder that the Interior Solicitor concluded in *1940* that "the reference to *'licensed traders'* is particularly suggestive of Indian reservations." 57 Interior Dec. 129, 139 (1940) (emphasis added).[11]

The term "licensed traders" was understood by Congress to be Indian traders during debate on the Buck Act in 1940. Act of October 9, 1940, Pub. L. No. 76-819, § 7, 54 Stat. 1059, 1060-61. Congressman Buck reported on April 23, 1940, that he had personally experienced "licensed trader" problems:

> We had some bad situations with regard to these *licensed traders*. There are *licensed traders* on certain reservations, for instance, at Palm Springs, Calif., you have your reservation line right down the street, and on one side of the street you have merchants who are paying sales taxes, and on the other side you have *licensed traders* who are not paying any sales tax on identically the same types of goods.

Application of State Sales and Use Taxes to Transactions in Federal Areas: Hearing on H.R. No. 6687 Before a Subcommittee of the Committee

(Continued on following page)

on Finance, United States Senate, 76th Cong., 3rd Sess. 2 (April 23, 1940) (emphasis added). The Agua Caliente Indian Reservation exists on a checkerboard pattern in the area of Palm Springs, California. The Hearing Officer may take judicial notice of the geographic fact that the only federal reservation in the vicinity of Palm Springs, California, is the Agua Caliente Indian Reservation. *Agua Caliente Band of Mission Indians v. County of Riverside*, 306 F. Supp. 279, 281 (C.D. Cal. 1969).

Finally, "licensed traders" appears in the United States Code only in the Hayden-Cartwright Act, 4 U.S.C. § 104. That term also appears in 25 Code of Federal Regulations Part 140, and 25 Code of Federal Regulations §§ 242.1 and 242.4.[11] Both references to the Code of Federal Regulations are to Indian matters. *See also Tinker v. Midland Valley Mercantile Company*, 231 U.S. 681, 682 (***1914***) ("a licensed trader with the Indians"); *Echols v. Tate*, 13 S.W. 253, 254, 53 Ark. 12, __ (1890) ("licensed trader").

The boundaries of the additional key term, "other reservations," were considered by the Attorney General in 1936, three months after the Hayden-Cartwright Act's adoption. He looked to the decisions of the Supreme Court for guidance and adopted the following definition:

> [T]he word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, *or an Indian reservation*, or, indeed, one for any purpose for which Congress has authority to provide. . . .

38 Op. Att'y Gen. 522, 524 (1936) (*quoting United States v. Celestine*, 215 U.S. 278, 285 (1909)) (emphasis added).[11] The Supreme Court has also recently taken a broad view of the phrase "reservation." *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993).

Senator Hayden, who served on the Conference Committee which authored the Hayden-Cartwright Act, previously served in the House of Representatives. While in the House of Representatives in 1921, he advocated use of the phrase "*reservations under federal control*" specifically to allow Indian lands to be treated as "unappropriated public lands" and thereby increase federal matching funds for the federal highway aid program. 61 Cong. Rec. 7135 (1921). The history shows that Senator Hayden understood that "federal reservations" included Indian reservations.

It is significant that Congress revisited the Hayden-Cartwright Act on three occasions after the issuance of *both* the Attorney General opinion

(Continued on following page)

Muddy Creek is operating as a licensed trader even though they do not possess a federal trader's license. The licensed trader provisions are found at 25 U.S.C. §§ 261, 262, 263 and 264. The above requires that everyone trading on the Indian reservations who are not full-blood Indians must be a licensed trader. There is caselaw indicating that federal trader's licenses are unavailable on the Pine Ridge reservation in South Dakota and the Court held the tribal permit to do business was sufficient. *United States ex rel. Keith v. Sioux Nation Shopping Center*, 488

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and the Interior Solicitor opinion, but did not change or amend the basic act. The first came with the adoption of the Buck Act. Act of October 9, 1940, Pub. L. No. 76-819, § 7, 54 Stat. 1059, 1060-61 (1940) (codified at 4 U.S.C. 105 et seq.). This law subjected all persons in "federal areas" to state sales, use, and income taxes except for "any Indian not otherwise taxed." 54 Stat 1059, 1060, §§ 1, 2, and 5. Section 7 of the Buck Act expanded the types of motor fuel taxes subject to the Hayden-Cartwright Act. 54 Stat. 1059, 1060-61. With passage of the Buck Act, Congress explicitly excepted Indians from certain types of taxation, but did not disturb the broad application of the Hayden-Cartwright Act to Indian reservations and motor fuel taxes.

Congress reenacted the Hayden-Cartwright Act without change in 1947, 61 Stat. 641, 644 (1947), and added a new section extending coverage to Guam in 1956, 70 Stat. 799 (1956). Surely if Congress had meant to overturn existing federal authority with regard to Indian reservation sales of motor fuels to Indians, it easily could have done so on each occasion. Congress made no attempt to do so. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . ." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

The settled rules of statutory construction adopted by the Supreme Court should apply in this case, with the plain language of 4 U.S.C. § 104 controlling. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993). That plain language removes all impediments to state taxation of motor fuels sold on Indian reservations to any person, including sales made by Muddy Creek. This conclusion is also supported by relevant legislative history.

F. Supp 496 (D.S.D. 1980) *aff'd.* 634 F. 2d 401 (8th Cir. 1980).

> **Whether Muddy Creek can claim a refund of motor fuel tax where the legal incidence of the motor fuel tax falls on the consumer pursuant to SDCL 10-47B-42, not Muddy Creek.**

SDCL 10-47B-42 reads as follows:

> The tax required to be paid by this chapter belongs to the state. The legal incidence of the tax falls upon the consumer of the fuel for the privilege of operating vehicles on the roads and highways of the state. A licensee, as a fiduciary of the state, shall hold the money in trust for the state and for payment to the department as provided in this chapter from the time the liability arises until it is paid to the state.

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995) recognizes the state's ability to specifically identify where the legal incidence of tax falls, such as South Dakota has done in SDCL 10-47B-42. Therein the legal incidence of the tax is on the consumer with the tax being pre-collected. (SDCL 10-47B-5, 10-47B-6).

Muddy Creek is neither the Oglala Sioux Tribe nor an enrolled member of it. The legal incidence of the fuel tax falls upon the consumer, not Muddy Creek. Therefore Muddy Creek does not come within the rules set down in *Chickasaw*. Any attempt by Muddy Creek to base its refund request on *Chickasaw* is therefore misplaced and fails.

Whether Muddy Creek is precluded from seeking a refund for motor fuel tax pursuant to SDCL 10-47B-131.2 because the legal incidence of the motor fuel tax is upon the consumer, not Muddy Creek.

SDCL 10-47B-131.2 reads as follows:

> A *consumer* of motor fuel or undyed special fuel may apply for and obtain a refund of fuel taxes imposed and paid to this state, if a state or federal court of final appeals finds that taxation of the purchase or use the fuel is preempted by federal law or unconstitutional. If applicable, the claim shall be supported by fuel purchase invoices, odometer readings, log books and calculated on an average mile per gallon basis (emphasis added).

It is clear from reading this statute that the only entity who is eligible for a refund is the "consumer" of the motor fuel. The consumers would be those individuals who frequent the pumps at Big Bats Texaco and purchase gasoline. From the testimony presented at the hearing it is clear "Muddy Creek" is not the consumer of the motor fuel and therefore SDCL 10-47B-131.2 does not apply.

Whether Muddy Creek may retain any refund of motor fuel tax where Muddy Creek does not bear either the legal or economic incidence of the motor fuel tax.

The Pouriers maintained throughout the hearing that they sold their gas tax-free. However, their margins on the fuel sold in Pine Ridge were in the $.39 to $.40 range. This far exceeds margins reported in convenience store industry totals which were in the range of $.11 to $.12 (Ex. 51). The IFTA tax returns showed Muddy Creek paid the $.22 per

gallon fuel tax on the 3,843 gallons of fuel they purchased at their own pumps. Muddy Creek is still claiming a refund on federal government GSA (Government Service Administration) credit cards from the Department of Revenue. If Muddy Creek is not collecting the $.22 per gallon at the pump then they should not be making claims to the Department of Revenue.

Muddy Creek is claiming a fuel tax refund of $532,109.93. Loren Pourier testified that any fuel tax refund he may receive would not be returned to the consumer (TR 65, 66, 102-03, 268). He indicated he would keep the money and use it for some sort of economic development on the Pine Ridge reservation. There was no in-depth plan for development provided. There was no plan in place for administering this money for economic development should Muddy Creek obtain a refund. This money belongs to the consumer. The legal incidence of the tax fell on the consumer. A non-existent plan for economic development is not sufficient to compensate the consumer. The refund would result in unjust enrichment for Muddy Creek.

CONCLUSIONS OF LAW

I.

This action is an administrative appeal of the denial of fuel tax refund applications for December 17, 1997 through December 31, 1999.

II.

The only claims that were considered in this appeal are those fuel tax refund applications for December 17, 1997

through December 31, 1999. All other claims are dismissed for lack of jurisdiction.

III.

SDCL 10-47B-141 requires that a refund application must be made within fifteen months of the original purchase date of the fuel.

IV.

The litigants to this action are the corporation Muddy Creek Oil and Gas and the South Dakota Department of Revenue.

V.

The Department has jurisdiction over the parties and subject matter of this hearing. The Office of Hearing Examiners is authorized to conduct the hearing pursuant to the provisions of SDCL 1-26D-4.

VI.

This matter is a contested case arising under Title X of the South Dakota Codified Laws.

VII.

Muddy Creek operates as a licensed trader even if it doesn't hold the license pursuant to 25 U.S.C. §§262 and 264; 25 C.F.R., Part 140.

VIII.

The Hayden-Cartwright Act, 4 U.S.C. §104 expressly authorizes the collection of state motor fuel taxes upon Indian reservations within the state.

IX.

Pursuant to SDCL 10-47b-42, the legal incidence of the motor fuel tax falls upon the consumer of the fuel for the privilege of operating a vehicle on the roads and highways of this state.

X.

Pursuant to SDCL 10-47B-131.2 the consumer of the motor fuel may apply for and obtain a refund of fuel taxes paid if a state or federal court finds the taxes preempted by federal law or unconstitutional.

XI.

Any questions regarding constitutionality of the states taxing scheme are reserved for determination by the circuit court.

XII.

Any additional Conclusions of Law included in the Reasoning section of this decision are incorporated herein by reference.

XIII.

To the extent any of the foregoing are improperly designated and are instead Findings of Fact, they are hereby redesignated and incorporated herein as Findings of Fact.

PROPOSED DECISION

The claims for refund of motor fuel tax made by Muddy Creek for any period of time prior to December 17, 1997 are dismissed. The Hayden-Cartwright Act, 4 USC § 104 expressly authorizes the collection of state motor fuel taxes upon the Pine Ridge Indian reservation. The denial of any marketer refund claims for the period of December 17, 1997 through December 31, 1999 by the Secretary of Revenue is affirmed.

Dated this 5th day of April, 2001.

/s/ Hillary J. Brady
Hillary J. Brady
Office of Hearing Examiners
445 East Capitol
Pierre, SD 57501
(605) 773-6813

38 U.S. Op. Atty. Gen. 522

United States Attorney General

TAXATION BY STATES OF MOTOR-VEHICLE FUELS SOLD IN NATIONAL PARKS

September 22, 1936.

National parks are reservations within the meaning of Section 10 of the Hayden-Cartwright Act of June 16, 1936, which permits any state, territory, or the District of Columbia to tax motor-vehicle fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies located on United States military or other reservations when such fuels are not for the exclusive use of the United States; and by virtue of that Act the states may levy taxes on gasoline and other motor-vehicle fuels sold by concessioners located in national parks when such fuels are not for the exclusive use of the United States.

to the SECRETARY OF THE INTERIOR.

SIR:

I have your letter of August 19, 1936, requesting my opinion whether Section 10 of the Hayden-Cartwright Act approved June 16, 1936 (Public No. 686, 74th Cong.) authorizes the collection of State taxes on sales of gasoline and other motor vehicle fuels by concessioners operating within the limits of the national parks. Section 10 reads as follows:

'(a) That all taxes levied by any State, Territory or the District of Columbia upon sales of gasoline and other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries,

filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory or the District of Columbia, within whose borders the reservation affected may be located.

'(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel not sold for the exclusive use of the United States during the preceding month.'

[49 Stat. 1521.]

The language of the section clearly states the purpose of the Federal Government to permit the States, the Territories, and the District of Columbia to levy taxes upon sales of motor vehicle fuels by or through the designated agencies located on United States military or other reservations when such fuels are not for the exclusive use of the United States. The question is whether national parks are reservations within the meaning of the words 'military or other reservations' as used in the section.

National parks comprise areas of the public domain reserved and withdrawn under the laws of the United States from settlement, occupancy, or sale and dedicated and set apart as parks or pleasure grounds for the benefit and enjoyment of the public. Defining the meaning of the term 'reservation', the Supreme Court in United States v. Celestine, 215 U. S. 278, 285, said that 'the word is used in the land law to describe any body of land, large or small,

which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide * * * '

It is true that some of the agencies which are expressly designated in Section 10 apparently are such as usually pertain to military, naval, or Indian reservations, and that the section does not expressly mention national parks. However, Section 5 of the Act does expressly refer to 'national parks, and national monuments'; one amendment to the original Federal-Aid Road Act of 1916 (39 Stat. 355) clearly includes national forests within the term 'reservations' (Act of May 21, 1928, 45 Stat. 683); and Section 3 of the final amendment, the Act here under consideration, pertains to unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations other than forest reservations. These provisions indicate that the Congress, in the Act as a whole, had in mind, and was dealing with, reservations generally, and there is no reason to assume that the comprehensive words 'military or other reservations' in Section 10 were intended to exclude reservations of the character elsewhere mentioned in the Act.

The section of the Act under consideration effects a partial waiver of the exclusive jurisdiction of the United States under its land laws, and I cannot escape the conclusion that national parks are 'reservations' within both the letter and the spirit of the Act.

The fact that the Congress has not used the word 'conscessioners' [sic] in enumerating the agencies through which motor vehicle fuels are sold on Government reservations is not controlling. It is to be observed that 'filling

stations', which obviously are capable of supplying a type of service that may be maintained either in connection with, or separate from, any of the other agencies mentioned, are enumerated co-ordinately with them; and that the words 'and other similar agencies' relate as well to 'filling stations' as to the other agencies which, like them, are particularized. I know of no reason why filling stations may not function in the national parks – indeed, I note that the form used by the Department of the Interior in contracting with concessioners in the national parks authorizes them to install and maintain 'gasoline filling stations.' Concessioners maintaining gasoline filling stations in the national parks would seem to fall precisely within the category of operators of 'filling stations' or, at least, of 'other similar agencies.'

For these reasons, and having in mind the purposes of the Act as a whole, I conclude that concessioners located in the national parks, selling motor vehicle fuels, are located on United States reservations within the contemplation of Section 10 of the Hayden-Cartwright Act, and that by virtue of that section the States may levy taxes on sales of gasoline and other motor vehicle fuels by or through such concessioners when such fuels are not for the exclusive use of the United States.

Respectfully,

HOMER CUMMINGS.

57 Interior Dec. 129

Department of the Interior (D.O.I.)

APPLICATION OF FEDERAL AND STATE SALES TAXES TO ACTIVITIES OF MENOMINEE INDIAN MILLS

Opinion, May 31, 1940

FEDERAL AND STATE GASOLINE SALES TAXES – MENOMINEE INDIAN MILLS – PURCHASE AND SALE OF GASOLINE FOR AND BY MILLS – STATE TOBACCO SALES TAX – TOBACCO SALES BY MENOMINEE INDIAN MILLS COMMISSARY.

Federal and State gasoline sales taxes (a) do not apply to sales of gasoline to the Menominee Indian Mills for use in the operations of the mills, but (b) do apply to sales of gasoline to the mills for resale through the commissary of the mills to employees and the general public.

The State tax on the selling of tobacco products does not apply to the selling of such products by the commissary of the Menominee Indian Mills to employees and the general public.

There have been referred to me for an opinion several questions raised by the Indian Office concerning the imposition of certain Federal and State taxes on sales made to and by the Menominee Indian Mills on the Menominee Indian Reservation in Wisconsin. The taxes in question are (1) the Federal excise tax on sales of gasoline, levied pursuant to section 617 of Title IV of the Revenue Act of 1932 establishing manufacturers' excise taxes, which appears in Title 26 of the United States Code following section 1481, and as chapter 29 of the Internal Revenue Code approved February 10, 1939 (53 Stat. 409);

(2) the State excise tax on the sale of gasoline, levied under chapter 78 of the Wisconsin Statutes of 1937; and (3) the State occupational tax on the sale of tobacco products, levied under chapters 443 and 518 of the Laws of Wisconsin, 1939.

The questions concerning these taxes may be formulated as follows:

1. Are the Menominee Indian Mills exempt from the Federal excise tax on sales to them of gasoline (a) for use in operation of the mills, and (b) for resale to employees and the public through the commissary maintained by the mills?

2. Are the Menominee Indian Mills exempt from the State excise tax on sales to them of gasoline (a) for use in operation of the mills, and (b) for resale to employees and the public through the commissary?

3. Are the mills exempt from the State occupation tax on the selling of tobacco products in the case of sales to employees and the public through the commissary?

These three questions raise distinct problems and will be treated in order.

I. APPLICATION OF THE FEDERAL GASOLINE SALES TAX

Section 617 of Title IV of the Revenue Act of 1932 places a tax on gasoline sold by any producer or importer, but section 620 (as amended, August 30, 1935, 49 Stat. 1025) exempts sales "for the exclusive use of the United States." The mechanics for such an exemption are set forth in section 621 which provides for a credit or refund to the

producer for taxes paid by him where the gasoline was "resold for the exclusive use of the United States." Section 624 contains the only reference to Indians. It provides that no tax shall be imposed under Title IV "on any article of native Indian handicraft manufactured or produced by Indians on Indian reservations, or in Indian schools, or by Indians under the jurisdiction of the United States Government in Alaska." However, the only subjects taxed by Title IV which could have relevance to section 624 are articles made of fur and articles of jewelry.

The regulations established by the Bureau of Internal Revenue under Title IV provide for an exemption from the tax of gasoline sold "for the exclusive use of the United States * * * " (sec. 314.24 of Regulations 44, under ch. 29, subch. A of the Internal Revenue Code). The exemption certificate required to be used consists of a certification by an officer of the United States that the articles are purchased for the exclusive use of the designated governmental unit. The certificate contains the express agreement that if the articles purchased tax free under the certificate are used otherwise than for the exclusive use of the United States or are sold to employees or others, the fact will be reported by the officer to the manufacturer of the article covered by the certificate.

(a) Purchases of gasoline for the operation of the mills.

Under these statutory provisions and the regulations, the first question is whether sales of gasoline for use in the operations of the Menominee Indian Mills are sales of gasoline "for the exclusive use of the United States." The answer to this question requires an analysis of the status

of the Menominee Mills and their relationship to the Federal Government.

The Menominee Indian Mills were established under the act of March 28, 1908 (35 Stat. 51), which authorized the Secretary of the Interior to cause to be cut and sold the lumber of the Menominee Reservation and to cause to be established sawmills for that purpose. All proceeds of the operations were to be deposited in the United States Treasury for the benefit of the Menominee Tribe and all expenses of the establishment and the operations were to be borne from the Menominee tribal funds and the proceeds of the operations. The amendment to that act of January 27, 1925 (43 Stat. 793), provided that the mills should be exempt from the requirements of sections 3709 and 3744 of the Revised Statutes, regulating the making of Government purchases and contracts. A further significant amendment was carried in the act of June 15, 1934 (48 Stat. 964), which required all expenditures in the operations of the mills to receive the advance review and approval of the tribal council or its authorized committee.

In the exercise of his administrative authority under the 1908 act the Secretary of the Interior appoints the manager and all the office personnel of the mills and has delegated to the manager the employment of all the mill workers, who are hired on a day-to-day or month-to-month basis. Some of the office personnel are civil service employees and most of them are classified under the Classification Act. All employees are paid from tribal funds. The manager is responsible to the Secretary of the Interior for the operations of the mills but is required to keep within the budget approved by the advisory board, in accordance with the 1934 amendment. Government forms are used in the disbursement and accounting of the funds of the mills,

Government regulations followed, and the accounts audited by the General Accounting Office, in the same manner as in the case of Indian Service operations generally.

Since the Menominee mills have represented a peculiar combination of tribal and Federal activities, they have been the subject of a number of rulings by various administrative agencies. In the first year of their operation, the Attorney General held that the Federal law providing an 8-hour day for Federal employees did not apply to employees of the Menominee mills. He described the mills as "an essentially private enterprise" in which the United States had invested the trust property of its wards for the benefit of those wards; also as a cooperative enterprise in which the tribe supplied the capital, the raw material and the labor, and the United States supplied the management (27 Atty. Gen. 139 (1909)).

In a letter dated November 16, 1933, to the Secretary of the Interior, the Comptroller General held that the Federal Economy Act did not apply to the employees of the mills. An analysis of the Interior Department's letter referring the question to the Comptroller General, upon which his reply was based, indicates that the ruling related only to the "irregular employees," meaning the employees hired by the manager and not the supervisory personnel employed by the Secretary of the Interior. After this ruling, the supervisory personnel continued subject to the Federal Economy Act.

A related ruling was made by the Employees Compensation Commission on September 18, 1936, to the effect that the Federal Employees Compensation Act did not apply to the "employees of the mill." This reversed an

administrative practice of the Commission of 20 years' standing. It does not appear whether a distinction has been observed in this connection between the supervisory employees and the laborers in the mill. Congress has, however, restored the original situation and confirmed the Federal aspect of the mills by the act of April 11, 1940 (54 Stat. 105), which specifically defines "employees" of the United States as including the employees in timber operations on the Menominee Reservation.

The most recent ruling involves the application of the Wages and Hours Act. This office, in the Solicitor's Opinion of November 28, 1938 (M. 29999), held that, until otherwise advised by the appropriate administrative agency, the Wages and Hours Act should be considered as applying to the Menominee mills since they could not be said to be exempted under the exemption of the "United States" as an employer. This ruling was confirmed by the Administrator of the Wages and Hours Administration in a letter to this Department of July 10, 1939, holding that the Wages and Hours Act was deemed to apply to all employees of the mills except those employees hired by the Secretary of the Interior and performing supervisory functions.

The foregoing administrative decisions lead to the conclusion that the employees of the Menominee mills, at least the nonsupervisory employees, are covered by Federal laws regulating employment in private industry and are not covered by Federal laws regulating employment in the Government itself unless clearly intended. This conclusion may be the logical one and correct in law and policy but still not determine the question whether gasoline purchased for the operations of the mills is exempt as for the use of the Federal Government. The mills must be

recognized as having a dual capacity. On the one hand they are a profit-making enterprise for the particular benefit of an individual tribe and on the other hand they are an agency of the Federal Government through which the United States seeks to fulfill its obligation of advancing its Indian wards. One aspect of the enterprise should not be observed to the exclusion of the other. Neither law nor logic requires adherence to one view of the character of the mills. In any case involving the application of a Federal law to these mills, the question is one of finding the intent of Congress in the particular circumstance. The determination of this question is the function primarily of this Department and such other administrative agencies as may be concerned with the enforcement of the particular law in question.

In this instance, it is my opinion that the aspect of the mills as a Government agency predominates over their aspect as a private industry and that the mills are exempt from the Federal tax on purchases for their operations for the following reasons:

(1) The exemption from the Federal sales tax of gasoline purchased for the operations of the mills has been accepted thus far without question by all the administrative agencies concerned. The purchase of gasoline for this purpose has been constantly referred to as the purchase of gasoline for "governmental operations." The practice of using exemption certificates for such purchases follows the customary Indian Service practice in Indian Service operations, whether or not the particular operations are being paid for from tribal funds. The purchasing is carried on according to governmental regulations and with the use of Government forms for disbursement and accounting. The exemption of the mills from compliance with certain

statutes governing the execution of Government contracts indicates that Congress recognized that the mills were operated as a Government operation.

(2) The management and supervision of the mills is clearly an Indian Service operation. From a practical viewpoint it would not be possible to separate the gasoline consumed in supervisory functions from the gasoline consumed for strictly productive purposes.

(3) A tax on the sale of gasoline for the operations of the mills is a tax on the operations of an agency of the Government and is not a tax on the income to any Indians resulting from such operations. The case of Superintendent of the Five Civilized Tribes v. Commissioner of Internal Revenue, 295 U. S. 418, holding that the Federal income tax applied to the income of Indians received from investment by the Government of the Indians' property, in no way indorses [sic] taxation of the processes of the investment of such property by the Government. The recent Supreme Court cases upholding Federal and State income taxes on the employees of each other (Helvering v. Gerhardt, 304 U. S. 405; Graves v. New York, 306 U. S. 466), distinguish a tax upon the income of employees from a tax on the operations of the Government itself. While these cases involve the relation between dual sovereignties, they illustrate a distinction useful in a case such as this, where an enterprise has the dual aspect of a Government function and a private business.

(4) The proceeds from the operations of the mills are not wholly devoted to per capita payments but large sums are used to carry on Government functions on the Menominee Reservation which otherwise would be paid for from Government funds, particularly the operations of the

Keshena Agency and the construction of such buildings as quarters for Government employees, a hospital and jail. Federal use of the proceeds of the operations is significant in determining the application to the operation of a Federal Tax, which reduces such proceeds, although it might not have such weight in determining the application of Federal laws regulating the method of operations.

(5) Even if the Menominee mills are considered solely as a private tribal enterprise, it is doubtful whether Congress intended that the Internal Revenue Act of 1932 should apply to gasoline purchased for tribal enterprises. The time-honored principle that general laws of Congress should not be so construed as to apply to Indians, if such application would adversely affect them (McCandless v. United States, 25 F. (2d) 71 (C. C. A. 3, 1928)), has been so far modified as to permit the application of the general Federal income tax law to the income of individual Indians (Superintendent of the Five Civilized Tribes v. Commissioner of Internal Revenue, supra). However, it has not yet been modified by the courts to apply general tax laws to the tribes and to tribal enterprises. This was pointed out in my opinion of June 30, 1937 (M. 29156), holding that the taxes imposed by the Social Security Act upon employers did not apply to Indian tribes operating enterprises under a trust agreement with the Government for the handling of Indian rehabilitation funds. This opinion, however, does not answer the present question since in that case the exemption provided by the statute in favor of the Government was broad enough to include agencies and instrumentalities of the Government. Until a court has required the application of such general tax laws to Indian tribes or clearly indicated their application, this Department

should refrain, I believe, from enunciating such a legal conclusion.

(6) In considering the application of general Federal laws to Indian tribes and tribal enterprises, I believe it is reasonable and essential for a distinction to be made between Federal laws providing for the regulation of interstate commerce and Federal laws providing solely for the raising of revenue. In the case of the regulation of interstate commerce, it is important for the act to reach all industries producing goods which flow in interstate commerce. For that reason, it may be said that tribal enterprises with interstate operations come within the policy of such Federal regulation. With that consideration in mind, I held in my opinion of November 28, 1938 (M. 29999), that the Wages and Hours Act should be considered as applying to the Menominee Indian Mills. In implied recognition of this policy the Menominee mills operated under the National Industrial Recovery Act and joined with other lumber enterprises in the lumber code. The same considerations do not, however, apply to general Federal laws for the raising of revenue. The exemption of tribal enterprises from such acts would not be an obstacle to the effectuation of the purposes of the act. On the other hand, the application of such acts would have a detrimental effect upon the operations of the tribal enterprise and this would be inconsistent with the purpose of Congress to foster and protect such tribal enterprises and the tribal funds used in the furtherance of such enterprises.

In this connection, the inclusion in Title IV of the 1932 Revenue Act of an express exemption of Indian handicrafts indicates an intent, not completely expressed, not to have the act affect Indian enterprises.

(7) An opinion upholding the exemption from the Federal sales tax of purchases of gasoline for the operation of these mills would follow the repeated decisions of this Department holding various tribal enterprises established, managed, and supervised by the United States as part of its program for Indian welfare not subject to this Federal tax. In a letter to the Superintendent of the Great Lakes Indian Agency, approved in the Department June 21, 1938, he was informed that purchases of gasoline for the sawmill established by the Lac du Flambeau Tribe under a rehabilitation loan could be made with exemption certificates exempting the purchase from this Federal sales tax. Again, in my memoranda to the Commissioner of Indian Affairs of December 3, 1938, and June 21, 1939, I held that such exemption certificates and Government license tags could be used in connection with the operations of the corporate hay enterprise carried on by the Chippewa Cree Tribe with revolving loan funds. I see no fundamental distinction between these tribal enterprises and the Menominee Indian Mills, and no reason which induces me to change the ruling in connection with these other tribal enterprises, at least until so advised by the Bureau of Internal Revenue. Whether or not this Department should take the initiative in presenting the question to that Bureau is an administrative question primarily for the consideration of the Indian Office.

There remains the question whether this conclusion should be changed in view of the recent case of United States v. Algoma Lumber Co., 305 U. S. 415. That case was a suit by the lumber company in the Court of Claims to recover from the United States for overpayment made under a contract for the cutting of timber on the Klamath Indian Reservation. The contract had been executed by the

Superintendent under the authority given to the Interior Department to provide for the sale of Indian timber under departmental regulations. The precise question in the case was whether the contract was a contract of the Government within the jurisdiction of the Court of Claims over contracts "with the Government of the United States" (28 U. S. C. A. sec. 250). The court held that the contract was not a contract of the United States but one made through an agency of the Government on behalf of the Indians, adding that the exercise by Congress of its power to manage and dispose of Indian property did not necessarily involve an assumption by the Government of contractual obligations. This holding was undoubtedly necessitated by the fact that the payments made under the contract were made for the benefit of the tribe and deposited in tribal funds. It recognizes, rather than denies, the fact that the management of the tribal timber was a Government operation. While a party to an Indian timber contract may not recover from the United States itself for money paid for the benefit of the Indians, in the contrary situation the United States may sue to recover on a breach of such a timber contract from the party to the contract for money due to the Indians (United States v. Harris, 100 F. (2d) 268 (C. C. A. 9, 1939)). The interest of the United States in contracts made in carrying on tribal timber operations is sufficiently great, in my opinion, to protect a purchase made in such operations through the agency of the Government from the tax here in question.

(b) Purchases of gasoline for resale to employees and the general public.

Where the Menominee Indian Mills purchase gasoline under an exemption certificate, such certificate may not

cover gasoline which is purchased for resale through the commissary to employees and the general public. This is established beyond doubt by the language of Title IV of the Internal Revenue Act of 1932, by the provisions of the regulations of the Internal Revenue Bureau and by the wording of the exemption certificate itself. The fact that some of the employees to whom the gasoline may be resold are Indians is immaterial in the question of the application of a Federal tax. As previously pointed out, individual Indians are not exempt from Federal taxation simply because they are Indians or wards of the Federal Government (Superintendent of the Five Civilized Tribes v. Commissioner of Internal Revenue, supra). Similarly, the fact that the gasoline may be resold within the Indian Reservation is immaterial in considering the application of a Federal, as distinct from a State, tax. Under the statute and regulations, the mills are responsible for the payment of the Federal tax on so much of the gasoline purchased as is used for resale to private persons.

II. APPLICATION OF THE STATE GASOLINE SALES TAX

The Wisconsin statute in question (ch. 78, Wisconsin Statutes 1937), places an excise or license tax on all motor fuel sold, used and distributed in the State, with the exception of fuel sold to the United States or any of its agencies except "as permitted by the Constitution or laws of the United States." The tax is enforced through a system of licenses on wholesalers who are responsible for the payment of the tax to the State.

The application of this act to purchases by the Menominee Indian Mills should be considered in the light of the act of Congress of June 16, 1936 (49 Stat. 1521, 23

U. S. C. A., sec. 55a). Because of the importance of this act it is quoted in full:

> (a) All taxes levied by any State, Territory or the District of Columbia upon sales of gasoline and other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied shall be paid to the proper taxing authorities of the State, Territory or the District of Columbia, within whose borders the reservation affected may be located.
>
> (b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel not sold for the exclusive use of the United States during the preceding month.

(a) Purchases of gasoline for the operation of the mills.

The State tax on the purchase of gasoline does not, in my opinion, apply to purchases of gasoline by the Menominee Indian Mills for their own operations. This conclusion is reached in the light of the following considerations:

(1) The State statute expressly exempts sales to "agencies" of the United States. In view of the discussion

in relation to Question 1, and the frequent holding by this office that Indian tribes carrying on enterprises under the management of the United States are Federal agencies, the Menominee Indian Mills would come within the exemption accorded by the State statute.

(2) Regardless, however, of the wording of the State statute, it is recognized that a State cannot tax the operations of a Federal agency. The tax in question would impose a direct burden on the operations of the agency. It is not remote in its effect on the agency, as has been found in the case of income taxes placed upon employees of an agency (Helvering v. Gerhardt, supra). These legal propositions have been the basis for several holdings by the Department that State gasoline taxes need not be paid in connection with purchases of gasoline for tribal enterprises (letter to the Superintendent of the Great Lakes Agency approved by the Department June 21, 1938; departmental telegram to the Navajo Agency of August 1, 1938; memoranda to the Commissioner of Indian Affairs from the Solicitor, of December 3, 1938 and June 21, 1939).

(3) The Act of Congress of June 16, 1936, above quoted, does not change this conclusion since, in the first place, it applies only to gasoline sold through commissaries and like agencies on the reservation. It does not appear that the gasoline purchased from wholesalers and dealers for the operations of the mills is sold to the mills through the commissary or any like agency on the Menominee Reservation. In the second place, even if such gasoline were sold to the mills on the reservation, the gasoline purchased for the operations of the mills would come within the exception in the Federal act for gasoline sold "for the exclusive use of the United States." If my conclusion is correct under Question 1 (a), supra, it has equal

application in this instance as the exemption clause in this 1936 statute is identical with that appearing in the 1932 Revenue Act, as amended.

(4) This conclusion seems to be in accord with the construction of the statute made by the State authorities since the State does not claim taxes for gasoline purchased for the operations of the mills. Its claim is related solely to gasoline resold by the mills through the commissary to private persons.

(b) Purchase of gasoline for resale through the commissary to private persons.

In the absence of the Federal statute above quoted, it would be my opinion that the State tax would not apply to sales made by a Federal agency or a tribal enterprise on an Indian reservation. My reasons for this conclusion appear more fully in my response to Question III. The principal reason is, however, that the State could not enforce such a tax against such an agency or enterprise since neither is subject to license or revocation of license by the State. The statute clearly subjects the sales made through the Government agencies specified to State gasoline sales taxes and provides the method by which such taxes shall be collected. It is not clear, however, whether the Government agencies specified are intended to include such a Federal agency as the Menominee tribal enterprise and whether the reference to reservations includes Indian reservations.

The legislative history of the statute supplies three indications that the words "United States military or other reservations" were meant to include Indian reservations. (1) The statute in question was introduced as an amendment

to the Federal Aid Highway Act of 1936 and the brief discussion surrounding it indicates that it was intended to permit the application of local sales taxes wherever they were not then collected because the sales were made on a reservation (Cong. Rec. Vol. 80, part 6, p. 6913; part 8, p. 8701). (2) In the same statute, there was a section devoted to roadways on Indian reservations indicating that attention was called in the consideration of the act to Indian reservations. (3) Moreover, when the amendment in question was introduced, the agencies enumerated did not include licensed traders and filling stations. The addition of these agencies by the conference committee indicates an intent to broaden the application of the statute, and the reference to "licensed traders" is particularly suggestive of Indian reservations. These indications, while slight, are sufficient to give ground for considering the broad language of the statute as including Indian reservations.

The language of the statute and the relevant legislative history I have reviewed distinguish this situation from that discussed in my memorandum for the Assistant Secretary of October 20, 1936, in which I held that the act of June 25, 1936 (49 Stat. 1938), extending State workmen's compensation laws over "lands and premises owned or held by the United States" did not extend Wisconsin's workmen's compensation laws over the Menominee Indian Reservation, and, in particular, over the Menominee Indian Mills. In that case I found that the language of the statute "given its ordinary meaning seems to embrace lands and property owned absolutely by the United States to the exclusion of other lands such as Indian reservations, the full beneficial ownership of which is in the Indian tribes * * *." The statute now in question significantly refers to reservations rather than to land ownership.

Moreover, the argument and policy in the two cases lead to opposite conclusions in respect to the application of the statute to the Menominee mills.

Finally, I believe that the designation in the statute of the agencies embraced by its terms must be interpreted to include such an agency as the Menominee Indian Mills. The statute uses the term "commissary" and it is the commissary of the mills which makes the resales. Secondly, the mills cannot claim exemption from Federal and State taxes as a Federal agency and then claim not to have sufficient character as a Federal agency to be covered by the intent of this statute.

While I am of the opinion, therefore, that the act of June 16, 1936, subjects to the State gasoline tax sales made through the commissary to private persons, there remains the question whether the statute also removes the immunity from such taxes of Indians making purchases on Indian reservations. In my memorandum for the Commissioner of Indian Affairs of February 4, 1938, and my Opinion of May 8, 1940 (57 I. D. 124) I held that State sales taxes did not apply to purchases from or by Indians on Indian reservations. Although the immunity of purchases from an Indian commissary might be removed by the Federal statute, purchases made by the Indians on the reservation might nevertheless be exempt. However, I think that this would not be the proper conclusion in view of the purpose of the statute to permit State taxes of all sales on reservations not previously subjected to such taxes, and of the wording of the statute, permitting taxes to be levied "in the same manner and to the same extent" as upon sales outside the reservation. Indians making purchases of gasoline outside the reservation must pay the sales tax in the same manner as other persons.

III. APPLICATION OF STATE SALES TAX ON TOBACCO PRODUCTS

The Wisconsin laws of 1939 (chs. 433, 518) place an occupational tax on the sale or other disposition of tobacco products except in the case of sales "for shipment in interstate or foreign commerce." Manufacturers and wholesalers are required to pay the tax by purchasing and affixing State stamps on the tobacco products. The statute makes it unlawful for other than registered salesmen to sell tobacco products in the State or to purchase such products from other than licensed wholesalers. Under this law the State authorities claim from the Menominee Indian Mills several hundred dollars in taxes based on the inventory of tobacco products on hand in the mills' commissary as of the date of the passage of the act.

The Menominee Indian Mills are not liable, in my opinion, for the payment of this tax for the following reasons:

(1) The application of this tax to the mills would constitute State regulation and taxation of a Federal agency in violation of the United States Constitution. The tax could not be enforced without State interference with the operations of the mills, as the procedure for enforcement of the State act through licenses, arrests and penalties clearly indicates. The act of Congress of June 16, 1936, permitting the collection of State gasoline sales taxes on Government reservations from Government agencies is sufficient illustration of the fact that such taxes are not collectible in the absence of congressional permission.

(2) The application of this tax to the Menominee Indian Mills would constitute a regulation of trade with the Indians which is beyond the power of the State.

Commerce with Indian tribes might have been included in the exceptions provided in the State law along with the exception of sales in interstate and foreign commerce, since all three such types of commerce are placed by the Constitution under the regulatory power of Congress. In my memorandum of February 4, 1938, supra, holding that State sales taxes did not apply to purchases made by or from Indians on Indian reservations, I referred to the fact that it was well established that Indians are not amenable to State laws while on their reservations unless expressly subjected to those laws by Congress. The Kansas Indians, 5 Wall. 737, 755, 756; United States v. Kagama, 118 U. S. 375; United States v. Rickert, 188 U. S. 432; United States v. Quiver, 241 U. S. 602; United States v. Hamilton, 233 Fed. 685; In re Blackbird, 109 Fed. 139; In re Lincoln, 129 Fed. 247; State v. Rufus, 237 N. W. 67.

Congress has not only not subjected the Indians to taxes in this case but has exercised its authority by granting to the Commissioner of Indian Affairs "the sole power and authority" to regulate trade with the Indians and to specify the prices at which goods shall be sold to the Indians (25 U. S. C. A., sec. 261). A sales tax placed upon sales by Indian enterprises or to Indians on the reservation or on the business of making such sales would be an interference with the regulation of trade and prices by the Commissioner. The question whether Indians should pay State sales taxes is a political question for the ultimate determination of Congress.

The conclusions reached in response to the foregoing questions may be summarized as follows:

1. The Menominee Indian Mills are liable for Federal and State sales taxes on gasoline sold to employees and

the public through the commissary operated by the mills. The liability of the mills for the State tax in this instance is due to an act of Congress.

2. The Menominee Indian Mills are not liable for the Federal or State sales tax on gasoline purchased for the operations of the mills.

3. The Menominee Indian Mills are not liable for the State tax placed on tobacco products, where tobacco products are sold through the commissary of the mills, whether the products are sold to Indians or to other persons.

Approved:

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Solicitor

(2)

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IN THE

Supreme Court of the United States

SOUTH DAKOTA DEPARTMENT OF REVENUE,
Petitioner,

v.

LOREN POURIER, D/B/A MUDDY CREEK OIL & GAS, INC.,
and MUDDY CREEK OIL & GAS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of South Dakota

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CONVENIENCE STORES IN SUPPORT OF THE SOUTH DAKOTA DEPARTMENT OF REVENUE'S PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... (ii)

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

ARGUMENT 3

I. THE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE OF THE IMPORTANCE OF THE QUESTION OF WHETHER THE HAYDEN-CARTWRIGHT ACT AUTHORIZES STATES TO IMPOSE MOTOR FUEL TAXES UPON SALES THAT OCCUR ON INDIAN RESERVATIONS. 3

A. Differences In State Taxes Paid Can Place Off-Reservation Retailers At A Pronounced Competitive Disadvantage Vis-à-Vis On-Reservation Retailers. 5

B. State Budgets Suffer If States Cannot Impose Taxes For On-Reservation Sales Of Motor Fuel 8

C. The Decision Below Conflicts With Adherence To The International Fuel Tax Agreement. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Coeur D'Alene Tribe v. Hammond, 224 F. Supp. 2d 1264, (D. Idaho 2002) 4
Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994) 9
Goodman Oil Co. v. Idaho State Tax Comm'n, 136 Idaho 53 (2001) 4
In re State Motor Fuel Tax Liability of A.G.E. Corp., 273 N.W.2d 737 (S.D. 1978) 4
Oklahoma Tax Comm'n v. Chikasaw Nation, 515 U.S. 450 (1995) 4
Pourier v. South Dakota Department of Revenue, 658 N.W.2d 395 (S.D. 2003) 4
Prairie Band of Potawatomi Nation v. Richards, 241 F. Supp. 2d 1295 (D. Kan. 2003) 4, 5
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 4
Winnebago Tribe of Nebraska v. Kline, 297 F. Supp. 2d 1291 (D. Kan. 2004) 4

STATUTES & REGULATIONS

SUP. CT. R. 37 1
4 U.S.C. § 104 (2004) 4
49 U.S.C. § 31701 (2004) 10
49 U.S.C. § 31705 (b) & (d) (2004) 10

TABLE OF AUTHORITIES -- CONTINUED

Page

OTHER AUTHORITIES

Competition, Tax Fairness and Protecting the Tax Base of State and Local Governments: Hearing on H.R. 1168 Before the House Committee on Resources, 105th Cong. (1998) (statement of John M. MacDougall, President, Nice N Easy Grocery Shoppes) 8

Competition, Tax Fairness and Protecting the Tax Base of State and Local Governments: Hearing on H.R. 1168 Before the House Committee on Resources, 105th Cong. (1998) (statement of William E. Haslam, President, Pilot Corporation) 7

Energy Information Administration, A Primer on Gasoline Prices (2003) 5

Federal Highway Administration, Monthly Motor Fuel Reported by States (December 2002) 5

Glenn Coin, *State May Seek Indian Tax Revenue; Legislators Are Expected to OK Bill that Requires Sales to Non-Indians be Taxed*, The Post Standard, May 2, 2003 8

National Association of Convenience Stores, 2003 State of the Industry (2003) 5, 6

Native American Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs, 105th Cong. (1998) (statement of Greg Love, President, Love's Country Stores, Inc.) 7

Native American Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs, 105th Cong. (1998) (statement of N.Y. Assemblyman Jeffrey Klein) 8

TABLE OF AUTHORITIES -- CONTINUED

Page

Native American Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs, 105th Cong. (1998) (statement of Representative Ernest J. Istook, Jr.) 7, 9

Native American Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs, 105th Cong. (1998) (statement of John Lattauzio, President, J & J Mini Markets) 8

United States Bureau of Indian Affairs *at* http://www.doi.gov/bureau-indian-affairs.html. 6

The National Association of Convenience Stores (NACS) respectfully submits this brief as *amicus curiae* in support of the Petitioners in accordance with the provisions of Supreme Court Rule 37.2.[1] All parties have consented to this filing, and their written consents have been lodged with the Court.

INTEREST OF *AMICUS CURIAE*

Founded in 1961, NACS is a non-profit trade association representing more than 1,700 retail and 1,700 supplier company members in the United States and abroad. NACS is the pre-eminent representative of the interests of convenience store operators. Its retail members operate more than 77,000 convenience stores worldwide. The majority of NACS retail members sell motor fuels (gasoline and diesel fuel) and NACS member companies collectively sell over 55 percent of all gasoline marketed in the United States each year. Overall, more than 100,000 convenience stores in the United States sell motor fuels.

If allowed to stand, the decision below requiring South Dakota to refund the taxes it has collected on motor fuels sold at Respondents' retail outlet would exacerbate competitive problems caused by the avoidance of motor fuel taxes by Native American retailers on reservations. Such tax avoidance often creates untenable competitive disadvantages for off-reservation retailers and deprives states of needed revenue.

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[1] This brief was not authored, in whole or in part, by counsel for any other party to this matter. No one other than *amicus curiae* the National Association of Convenience Stores, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

This case will determine whether states can protect their motor fuel tax revenues and stop unfair competition from driving off-reservation retailers out of business. In the decision below, the Supreme Court of South Dakota held that the Hayden-Cartwright Act does not authorize states to collect taxes on sales of motor fuels made on Indian reservations. As pointed out in the Petition for Writ of Certiorari, that holding does not comport with the language or the history of the Hayden-Cartwright Act. This Court has never addressed the issue presented in this case and should take this opportunity to do so because resolution of this issue is of critical importance to private businesses and states throughout the nation. If allowed to stand, the holding of the Supreme Court of South Dakota will lead to an erosion of state revenues and will bankrupt many off-reservation businesses.

State taxes constitute a large proportion of the prices of both gasoline and diesel fuel. On average, in fact, state taxes on each gallon of these products are greater than the per-gallon profits that retailers make on these sales. Accordingly, if one class of retailer (those located on Indian reservations) does not pay state taxes on the motor fuels it sells, the competitive advantage is likely impossible for other retailers to overcome.

Competition between motor fuel retailers located on and off of reservations is common. On-reservation retailers purposely establish their businesses in locations calculated to draw business from outside the reservation. The negative impact of this competition for off-reservation motor fuel retailers is typically dramatic. Unless this Court resolves this issue, unfair competition from on-reservation retailers is

likely to increase and cause additional damage to off-reservation retailers.

In addition, states will lose substantial revenue unless this issue is addressed. States already lose about $1.4 billion per year in gasoline and cigarette taxes due to on-reservation sales.[2] As additional on-reservation retail operations are established and compete with off-reservation retailers, these lost revenues will increase. The states' lost revenues will be aggravated by the income and property taxes lost when off-reservation retailers go out of business. Use tax revenues on fuel sales to interstate commercial motor vehicle operators also will be lost because the decision below makes it difficult, if not impossible, to properly implement the International Fuel Tax Agreement.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE OF THE IMPORTANCE OF THE QUESTION OF WHETHER THE HAYDEN-CARTWRIGHT ACT AUTHORIZES STATES TO IMPOSE MOTOR FUEL TAXES UPON SALES THAT OCCUR ON INDIAN RESERVATIONS.

States' ability to impose taxes on sales of motor fuels made within Indian reservations has wide-ranging ramifications not only for states but for thousands of private businesses throughout the nation. Businesses including convenience stores, truck stops, travel plazas, and traditional gasoline

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[2] Taxes lost on cigarette sales include those made by on-reservation retailers over the Internet, by telephone and through the mail.

stations sell motor fuels. These businesses are placed at a competitive disadvantage when reservation retailers sell motor fuels without collecting state taxes.

The potential for pronounced competitive effects on businesses as well as the strain on state budgets makes resolution of the question presented in this case essential. Petitioner in this case contends that the Hayden-Cartwright Act, 4 U.S.C. § 104, authorizes states to tax motor fuels sold on Indian reservations. While state courts in Idaho, North Dakota, and South Dakota, and federal courts in Idaho and Kansas have directly addressed this question, this Court has never done so. *Compare Winnebago Tribe of Nebraska v. Kline*, 297 F. Supp. 2d 1291, 1304-05 (D. Kan. 2004); *Prairie Band of Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1303-07 (D. Kan. 2003) (describing as unfortunate the lack of guidance from the Circuit Courts or Supreme Court on whether the Hayden-Cartwright Act authorizes taxation of motor fuels on reservations); *Coeur D'Alene Tribe v. Hammond*, 224 F. Supp. 2d 1264, 1268-69 (D. Idaho 2002); *Pourier v. South Dakota Department of Revenue*, 658 N.W.2d 395, 403 (S.D. 2003); *Goodman Oil Co. v. Idaho State Tax Comm'n*, 136 Idaho 53, 55-59 (2001); *In re State Motor Fuel Tax Liability of A.G.E. Corp.*, 273 N.W.2d 737, 739 (S.D. 1978), *with Oklahoma Tax Comm'n v. Chikasaw Nation*, 515 U.S. 450, 456-57 (1995) (refusing to consider effect of Hayden-Cartwright Act on reservation sales because the issue was not raised in the court below or at the petition stage); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n.16 (1980) (finding pre-emption based on the law regarding tribal timber and not addressing applicability of the Hayden-Cartwright Act to reservation sales generally). The need for guidance on this critical issue is apparent. The United States District Court for the District of Kansas has noted that this is a "difficult" issue to resolve

and that the lack of guidance in resolving it is unfortunate. *Richards*, 241 F. Supp. 2d at 1304. Because the stakes are so high for the economic well-being of states and private businesses, this Court should accept this case and provide the lower courts with the guidance they need to resolve future disputes.

A. Differences In State Taxes Paid Can Place Off-Reservation Retailers At A Pronounced Competitive Disadvantage Vis-à-Vis On-Reservation Retailers.

Every state imposes volume taxes on gasoline and diesel fuel. Federal Highway Administration, Monthly Motor Fuel Reported by States (December 2002). State taxes account for a large portion of the price of a gallon of gasoline and diesel fuel. In 2002, state excise taxes averaged 19.1 cents per gallon for gasoline and 20 cents per gallon for diesel fuel. *Id.* These state excise taxes alone were more than 14 percent of the $1.35 average price of a gallon of gasoline and eleven states imposed additional sales and other taxes on top of their excise taxes. *See* Energy Information Administration, A Primer on Gasoline Prices 2 (2003). By comparison, the average profit margin for a convenience store on its sales in 2002 was 12.7 cents per gallon for gasoline and only 9.6 cents per gallon for diesel fuel. National Association of Convenience Stores, 2003 State of the Industry 1, 75 (2003). This means that an average convenience store would have to sell gasoline at a substantial loss in order to price its fuel to be competitive with an on-reservation retailer that does not pay state taxes on its fuel.

On-reservation retailers use their price advantage to compete with off-reservation retailers. On-reservation retailers typically establish locations near reservation borders and

major highways in order to entice customers that might otherwise patronize off-reservation stores. The United States holds 55.7 million acres of land in trust for the 562 federally recognized tribal governments. United States Bureau of Indian Affairs *at* http://www.doi.gov/bureau-indian-affairs.html. These lands provide many options for strategic, competitive placement of motor fuel retail outlets. Nearly every state has federally recognized tribes and there are reservations in more than twenty-five states. The ubiquity of tribes and reservation lands creates substantial risk that competitive threats to off-reservation retailers from on-reservation retailers and drains on state budgets will increase.

This situation presents a poor business outlook for many off-reservation retailers. Motor fuels made up 62.4% of total sales for convenience stores in 2002. National Association of Convenience Stores, 2003 State of the Industry 5 (2003). Competition from on-reservation retailers that do not pay state motor fuel taxes can cause dramatic reductions in sales. In New York, for example, on-reservation retailers often sell more than 100,000 gallons of gasoline per week while their off-reservation competitors sell only about 30,000 gallons per week. Losses caused by tax-free competition from tribal retailers often cannot be made up by stores at other locations because more than 78,000 of the approximately 101,000 convenience stores selling motor fuels in the United States in 2002 were single store operators, *Id.* at 22, 74, and the average convenience store's *pre*-tax profits in 2002 were $20,400. *Id.* at 10. In light of the importance of motor fuel sales to convenience stores, the small profit margins for these businesses, and the large number of single store operations, many convenience stores simply cannot survive competition from reservation retailers that do not pay state taxes.

Examples of the dramatic, negative impact that tax-free sales of motor fuels on reservations can have are numerous. One convenience store operator in Buffalo saw his monthly gasoline sales fall from 70-80,000 gallons per month to 6,000 gallons per month after a Native American retail operation opened in his area. *Competition, Tax Fairness and Protecting the Tax Base of State and Local Governments: Hearing on H.R. 1168 Before the House Committee on Resources*, 105th Cong. (1998) (statement of William E. Haslam, President, Pilot Corporation). In Oklahoma, one of Love's Country Stores operating outside of a reservation lost $5,000 on sales of more than $6.5 million. *Native American Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs*, 105th Cong. (1998) (statement of Greg Love, President, Love's Country Stores, Inc.). If that same store had made the same sales but not paid the state taxes because it was owned by a tribal member, it would have made a profit of more than $925,000. *Id.*

In fact, a 1998 market survey of the state of New York found that 70 percent of the residents interviewed who lived in counties adjacent to Indian reservations purchased tax-free items from Native American retailers. *Id.* One out of five respondents patronized reservation retailers more than once each week. *Id.*

The steep discounts that tribal retailers can offer if they do not pay state taxes can draw customers even from distant businesses. *Native American Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs*, 105th Cong. (1998) (statement of Representative Ernest J. Istook, Jr.). The result of these market factors is that if states cannot collect excise taxes for on-reservation sales of motor fuels, many convenience stores will not survive.

B. State Budgets Suffer If States Cannot Impose Taxes For On-Reservation Sales Of Motor Fuel.

Because of the volume of sales made by on-reservation retailers of motor fuels, the states lose substantial revenue if they do not collect taxes on these sales. Reservation retailers in New York, for example, failed to pay approximately $300 million in state taxes on motor fuel and tobacco to the state in 1998. *Native American Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs*, 105th Cong. (1998) (statement of N.Y. Assemblyman Jeffrey Klein); *Competition, Tax Fairness and Protecting the Tax Base of State and Local Governments: Hearing on H.R. 1168 Before the House Committee on Resources*, 105th Cong. (1998) (statement of John M. MacDougall, President, Nice N Easy Grocery Shoppes). About $200 million of this total was due to unpaid taxes on motor fuels. *Id.* (statement of N.Y. Assemblyman Jeffrey Klein). Similarly, on-reservation sales of motor fuels and tobacco in New Mexico cost the state about $14 million in tax revenue in 1998. *Native American Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs*, 105th Cong. (1998) (statement of John Lattauzio, President, J & J Mini Markets). More recent estimates indicate that state and local governments lose up to $1.4 billion in gasoline and cigarette taxes due to sales made on reservations and, with respect to cigarettes, by means of internet, mail and telephone orders. Glenn Coin, *State May Seek Indian Tax Revenue; Legislators Are Expected to OK Bill that Requires Sales to Non-Indians be Taxed*, The Post Standard, May 2, 2003, at B1.

Limitations on state authority to tax on-reservation sales also lead to increased tax evasion and fraud. This Court, for example, had evidence before it in the case of *Department of*

Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., that the purported consumption of cigarettes by tribal members consistent with New York's plan to only tax non-Indian consumers was 32 times the statewide average rate of consumption. 512 U.S. 61, 65 (1994). As Congressman Ernest J. Istook, Jr. put it, "Unfortunately, some tribes have exploited this exemption [for sales to tribal members], leading non-tribal purchasers to believe they do not owe the sales, fuel or excise taxes on these transactions, since the tribes do not charge them." *Native American Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs*, 105th Cong. (1998) (statement of Representative Ernest J. Istook, Jr.). The result, of course, is additional revenue losses by the states.

In addition, as noted, competition from on-reservation retailers that do not have to charge state taxes can drive off-reservation retailers out of business. Losing these off-reservation retailers would not only affect their owners and employees, but it would create an additional drain on state revenues. States would lose the excise, sales and other taxes on transactions made at those stores as well as income and property taxes paid by those stores. The drain on state resources due to the inability to tax sales on reservations can quickly multiply far beyond the sum of the losses on individual transactions.

C. The Decision Below Conflicts With Adherence To The International Fuel Tax Agreement.

The decision of the South Dakota Supreme Court in this litigation also merits review because it calls into question the viability of the International Fuel Tax Agreement (IFTA). Adopted by Congress in 1994, IFTA is an interstate agreement for the collection and distribution of fuel use

taxes. 49 U.S.C. § 31701 (2004). Since September 30, 1996, states have only been permitted to collect fuel use taxes if they comply with IFTA and share the proceeds collected from operators of interstate commercial motor vehicles[3] with other states. 49 U.S.C. § 31705 (b) (2004).[4] These use tax revenues are apportioned among the states based upon the number of miles the interstate operator traveled in each state. Interstate operators of commercial vehicles that purchase motor fuel on a reservation, however, may not know that the state tax has not been charged. Their erroneous reports of the taxes paid may cause difficulties with administration of IFTA. In addition, interstate operators that know they were not charged the state tax may fraudulently report that they paid the tax in order to save money. Catching such fraud would be an overwhelmingly expensive and time-consuming task.

Interstate operators of commercial vehicles are among the most price-sensitive motor fuel purchasers. They may choose the best price between retail outlets that are separated by 100 miles or more of highway. Given the significant price advantage that can result from tax-free sales, a large percentage of these consumers are apt to choose reservation retailers. Accordingly, the decision below undermines the implementation of IFTA and may result in additional tax collection shortfalls for states over and above the loss of excise tax revenue.

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[3] Vehicles covered by IFTA are primarily long haul trucks.

[4] There is an exception to this requirement for states that have continuously participated in the Regional Fuel Tax Agreement since January 1, 1991. 49 U.S.C. § 31705 (d) (2004).

CONCLUSION

For the foregoing reasons, NACS urges this Court to accept the petition for writ of certiorari and review the decision of the Supreme Court of South Dakota.

Respectfully Submitted,

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* STATES 1

STATEMENT 3

ARGUMENT 8

I. THE HAYDEN-CARTWRIGHT ACT IS A "GENERAL" LAW AND NOT INDIAN LEGISLATION. THE SOUTH DAKOTA COURT'S DECISION THEREFORE RAISES THE IMPORTANT QUESTION WHETHER THE INDIAN CANONS APPLY TO THE STATUTE'S CONSTRUCTION 8

II. BECAUSE THE SOUTH DAKOTA SUPREME COURT DEPARTED FROM ESTABLISHED FEDERAL LAW PRINCIPLES IN HOLDING A STATE LAW-CREATED CORPORATION IS ENTITLED TO IMMUNITY FROM MOTOR FUEL TAXATION, REVIEW IS WARRANTED 16

CONCLUSION 20

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003) 12

Brevet Int'l, Inc. v. Great Plains Luggage Co., 604 N.W.2d 268 (S.D. 2000) 16

Bryan v. Itasca County, 426 U.S. 373 (1976) 12

Chippewa Trading Co. v. Cox, No. 03-1445, 2004 WL 828087 (6th Cir. Apr. 19, 2004) 17

Coeur d'Alene Tribe v. Hammond, 224 F. Supp. 2d 1264 (D. Idaho 2002), *appeals pending*, Nos. 02-35965 *et al.* (9th Cir.) 9

County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251 (1992) 19

Department of Interior v. Klamath Water Users Protective Association, 532 U.S. 1 (2001) 13

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) 15

EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir. 1993) 15

EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071 (9th Cir. 2001) 15

FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960) 10, 11, 12, 13, 15

Goodman Oil Co. v. Idaho State Tax Comm'n, 28 P.3d 996 (Idaho 2001), *cert. denied*, 534 U.S. 1189 (2002) 9, 14

In re Motor Fuel Tax Liability of A.G.E., 273 N.W.2d 737 (S.D. 1978) 14

TABLE OF AUTHORITIES – Continued

Page

Kan. Gas & Elec. Co. v. Ross, 521 N.W.2d 107 (S.D. 1994) 16

Minnesota v. Keeley, 126 F.2d 863 (8th Cir. 1942) 14

Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) 8, 12

NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002) 15

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 19

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) 15, 18

Osloond v. Osloond, 609 N.W.2d 118 (S.D. 2000) 16

Prairie Band Potawatomi Nation v. Richards, 241 F. Supp. 2d 1295 (D. Kan. 2003), *appeal pending*, No. 03-3218 (10th Cir.) 9

Reich v. Great Lakes Indian Fish and Wildlife Comm'n, 4 F.3d 490 (7th Cir. 1993) 15

Rice v. Rehner, 463 U.S. 713 (1983) 17

Standard Oil Co. v. California, 291 U.S. 242 (1934) 9

United States v. Celestine, 215 U.S. 278 (1909) 8

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 7

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 17, 18

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 19

Winnebago Tribe v. Kline, 297 F. Supp. 2d 1291 (D. Kan. 2004) 9

TABLE OF AUTHORITIES – Continued

Page

PUBLIC ACTS AND STATUTES

Pub. L. No. 76-819, 54 Stat. 1059 (1940) 14
Pub. L. No. 80-279, 61 Stat. 641 (1947) 14
Pub. L. No. 84-876, 70 Stat. 799 (1956) 14
Pub. L. No. 93-262, 86 Stat. 77 (1974) 18
48 Stat. 993 (1934) 10
4 U.S.C. § 104 1
5 U.S.C. § 552(b)(5) 13
25 U.S.C. §§ 1451-1544 18
25 U.S.C. § 1521 18
28 U.S.C. § 1341 17
28 U.S.C. § 1362 17
S.D. Codified Laws §§ 47-1-1 through 47-7-59 3
S.D. Codified Laws § 10-47B-4(1) 3
S.D. Codified Laws § 10-47B-22 4
S.D. Codified Laws § 10-47B-42 4
S.D. Codified Laws § 10-47B-59 3
S.D. Codified Laws § 10-47B-60 3
S.D. Codified Laws § 10-47B-61 3
S.D. Codified Laws § 10-47B-65 3
S.D. Codified Laws § 10-47B-148 4
S.D. Codified Laws § 10-47B-149 4

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

79 Cong. Rec. 4083 (1935) 9

80 Cong. Rec. 6913 (1936) 9

57 Interior Dec. 129 (1940) 6, 13

38 Op. Att'y Gen. 522 (1936) 13

S. Rep. No. 76-1625 (1940) 14

United States Dep't of Transp., *America's Highways: 1776-1976* (1976) 10

BRIEF *AMICUS CURIAE*

The States of Idaho *et al.* respectfully submit, pursuant to Sup. Ct. R. 37.4, a brief *amicus curiae* in support of the Petition for Writ of Certiorari.

INTEREST OF *AMICI CURIAE* STATES

State motor fuel taxation is unusual for at least one important reason: The resulting revenue typically is devoted to expenditure for the construction, maintenance, and repair of highways, roads, other transportation-related infrastructure, and associated administrative responsibilities.[1] The exaction thus facilitates the very activity to which the tax relates, namely, the operation of motor vehicles. States have a practical interest in maximizing collection of such revenue given the centrality of transportation infrastructure to their overall economies and a policy interest in ensuring that all persons who benefit from this infrastructure bear their fair share of its costs.

Congress recognized these interests when it adopted section 10 of the Hayden-Cartwright Act in 1936. Act of June 16, 1936, § 10, ch. 582, 49 Stat. 1519, 1521 (codified as amended at 4 U.S.C. § 104) ("Hayden-Cartwright Act") (App. 1). The language used in the statute meshes straightforwardly with the congressional purpose; *i.e.*, the

[1] The Federal Highway Administration has prepared a summary of each State's statutorily-mandated disposition of motor fuel taxes as of January 1, 2001. *See* http://www.fhwa.dot.gov/ohim/hwytaxes/2001/tab6_toc.htm (last visited Apr. 24, 2004).

Act subjects gasoline or other motor fuels sold on United States "reservations" to the same state taxes imposed elsewhere and thereby ensures that *all* fuel sales in the State are taxed. By virtue of the Hayden-Cartwright Act, no tax-free geographical vacuums exist. Congress explicitly considered whether exceptions to this general requirement should be made and exempted only fuel sold for the Federal Government's "exclusive use."

Notwithstanding the clarity of Congress' direction, the South Dakota Supreme Court applied the Indian canons of construction to reach the conclusion that the term "reservations" does not encompass Indian reservations. The decision below ignored this Court's instruction that tribes and tribal members are presumptively subject to "general" federal statutes identically to other United States citizens. It also failed to recognize that the canons apply only to Indian treaties or Indian-related legislation. Accordingly, they have no role in this case. The Petition's first question offers this Court an opportunity to reiterate these core principles and, in so doing, to carry out Congress' manifest objective in adopting the Hayden-Cartwright Act.

The South Dakota court compounded its misapprehension of federal Indian law standards with respect to construing general federal legislation by concluding that an artificial entity, Respondent Muddy Creek Oil & Gas, Inc., enjoys immunity from the state fuel tax merely because a tribal member, Respondent Pourier, is the corporation's sole shareholder. This Court has devoted substantial attention to developing a consistent set of standards for demarcating the permissible scope of state tax jurisdiction on Indian reservations. A fundamental component of this jurisprudence is that, absent a contrary congressional directive, States possess the same measure

of taxing authority over Indians who are not members of the reservation's governing tribe as over non-Indians. Consequently, in the exercise of their taxation power on Indian reservations, States rely on tribal member, not merely Indian, status as the initial step in analyzing and resolving jurisdictional issues. The decision below ignores that settled distinction and undermines this Court's efforts to establish concrete preemption standards in a sensitive and often complex area of Indian law. The *amici* States have a strong interest in immediate correction of this departure from core doctrinal principles.

STATEMENT

1. Respondents are an individual member of the Oglala Sioux Tribe and Muddy Creek Oil & Gas, Inc. ("Muddy Creek"), his wholly-owned corporation created under South Dakota statutes. Pet. App. 15-16, 56; *see* S.D. Codified Laws §§ 47-1-1 through 47-7-59. Muddy Creek is licensed under state law as a fuel importer, exporter, marketer, and transporter. Pet. App. 16, 57; *see* S.D. Codified Laws §§ 10-47B-59, 10-47B-60, 10-47B-61, 10-47B-65. Among its retail outlets is a convenience store on the Pine Ridge Indian Reservation where it sells fuel predominately to Indian residents on the Reservation. Pet. App. 16, 56. The fuel is purchased in Nebraska by Muddy Creek and transported to the reservation outlet in Respondent Pourier's trucks. Pet. App. 57.

South Dakota imposes a 22-cents-per-gallon tax on motor fuel and assigns the tax's legal incidence to the ultimate consumer in return for the privilege of operating motor vehicles on state roads. S.D. Codified Laws §§ 10-47B-4(1),

10-47B-42; *see* Pet. App. 32-33. Muddy Creek, when acting as an importer, is required to pre-collect and remit the tax. S.D. Codified Laws § 10-47B-22; *see* Pet. App. 57. It then passes the tax amount through to the consumer as part of the fuel's purchase price. Pet. App. 58. All fuel tax remittances are placed into a motor fuel tax fund (S.D. Codified Laws § 10-47B-148), with distributions made monthly for specified purposes, including payment of motor fuel tax refunds and administrative costs, and with the balance transferred to the state highway fund (*id.* § 10-47B-149). South Dakota maintains the principal highways that traverse the Reservation. Pet. App. 20 n.2.

2. This litigation began when Muddy Creek filed refund claims totaling almost $1 million for all tax amounts remitted since July 1995 with respect to fuel imported for sale at the reservation outlet. Pet. App. 17. Muddy Creek contended in relevant part that the state tax was preempted by federal law and that, as an importer, it bore the tax's legal incidence. Its claims were denied administratively and on judicial review by a state circuit court on the ground that the motor fuel tax was authorized by the Hayden-Cartwright Act. Pet. App. 16, 45-50, 51.

The South Dakota Supreme Court reversed and remanded for further proceedings with respect to refunds claimed by actual consumers, including Muddy Creek. The first question addressed was whether the Hayden-Cartwright Act applied to Indian reservations. In answering this question, the court began with the principle that "[a] state has no power to tax tribes, Indian reservation lands, or tribal members residing on Indian reservations unless there has been a cession of jurisdiction or other federal statute permitting the tax." Pet. App. 18-19. It then added two canons of construction to the analysis: The

requisite congressional authorization to tax must be "'unmistakably clear,'" and where two constructions are possible, the statute must be interpreted in favor of the tribes or their members. Pet. App. 19.

Against this "necessary background" (Pet. App. 19), the court first rejected Petitioner's contention that a "plain reading" of the Hayden-Cartwright Act, and particularly its use of the terms "other reservations" and "licensed traders," reflected clear congressional intent to encompass Indian reservations. It relied on the Indian canons for this determination:

- "[A]n Indian reservation has distinct characteristics unique from those of other federal government reservations. . . . [F]ederal reservations, such as national parks and monuments and military posts, are created and maintained for the benefit of the federal government. Indian reservations were created for the benefit of the tribes. To assume that in this one instance Congress implicitly relied on this definition to abrogate Indian tax immunity is to ignore the context of the Court's definition and the requirement that Congress manifest its *clear* intent that the Indian in Indian country is taxable." Pet. App. 23.

- Inclusion of "licensed traders" within the Act's coverage did not warrant construing the statute as applicable to Indian reservations because "[e]ven if we accept the proposition that the term 'licensed trader' was an Indian law term of art in the federal courts, there is no sign that Congress treated it as such. Congress gave no indication in the statute that the term referred to Indian traders as

opposed to those non-Indian traders who were required to obtain a license to sell fuel." Pet. App. 24.

- Petitioner's reliance on a United States Department of the Interior Solicitor opinion, 57 Interior Dec. 129 (1940) (Pet. App. 84), which concluded that gasoline sales through a commissary on an Indian reservation were subject to the Act, was unwarranted because "[t]he Solicitor's equivocation regarding whether the Act applied to Indian reservations and his admission that the 'indications' that the Act applied to Indian reservations were 'slight' are simply not enough to overcome the presumption that Indians on Indian land retain tax immunity." Pet. App. 25.

- The circuit court erred in assigning any interpretative significance to Congress' failure to amend the Act after the Solicitor's opinion because "[w]e cannot find 'unmistakably clear' congressional intent by negative implication." Pet. App. 25.

In sum, "[t]he vague language of the Act, and Congress' failure to even address Indian tax immunity either in the Act or the legislative history, lead us to the conclusion that it failed to manifest unmistakably clear intent to abrogate Indian tax immunity." Pet. App. 27.

The court then turned to the issue of which economic actor bears the legal incidence of the fuel tax. It rejected Respondents' position that Muddy Creek, as an importer and "marketer," bore such incidence, relying on the South Dakota legislature's explicit allocation of incidence to the consumer. Pet. App. 32. That determination, however, did not end the inquiry because, in the court's view, not only

did Muddy Creek have standing to challenge the tax through its obligation to prepay the tax but it also acted as a consumer when purchasing fuel for its transport trucks. Pet. App. 33.

On the latter point, the court held that, notwithstanding Muddy Creek's status as a South Dakota corporation, it was entitled to the same immunity from state taxation because its sole shareholder is a member of the Reservation's governing tribe. Pet. App. 29. It reached this determination as a matter of federal law, relying on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), for the apparent proposition that corporations, despite their lack of racial identity, may "assert claims under [42 U.S.C.] § 1981 based on the fact that a corporation was owned or managed by persons with identifiable racial identity." Pet. App. 30. It additionally pointed to regulations under the Indian Business Development Program allowing "Indian corporations" to make grant funding applications. Pet. App. 31 (citing 25 C.F.R. § 286.3). Last, the court identified "[p]olicy considerations" that merited extending tax immunity to Muddy Creek, including interfering with "tribal independence and development" by "forc[ing] economic developers on reservations to forgo the benefits of incorporation in order to maintain their guaranteed protections under federal Indian law." *Id.*[2]

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[2] The decision below also discussed, and rejected, a procedural due process claim advanced by Respondents and a statute-of-limitations issue. Pet. App. 34-36. The latter issue was revisited on rehearing in a separate opinion. Pet. App. 1-14. Neither issue is relevant to the questions presented in the Petition.

ARGUMENT

I. THE HAYDEN-CARTWRIGHT ACT IS A "GENERAL" LAW AND NOT INDIAN LEGISLATION. THE SOUTH DAKOTA COURT'S DECISION THEREFORE RAISES THE IMPORTANT QUESTION WHETHER THE INDIAN CANONS APPLY TO THE STATUTE'S CONSTRUCTION.

The South Dakota Supreme Court's conclusion that the term "reservations" in the Hayden-Cartwright Act does not extend to Indian reservations was predicated on its application of the Indian canons of construction. *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (summarizing Indian canons relevant to taxation). No legitimate dispute exists that, but for the assumed applicability of those canons, the ordinary meaning of "reservation" would control and that Indian reservations would have been included within the statute's scope. An Indian reservation, after all, is nothing if it is not a "reservation" – *i.e.*, an area of land set aside by the United States for a particular federal purpose. *E.g.*, *United States v. Celestine*, 215 U.S. 278, 285 (1909) ("The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide"). The threshold, and here decisive, question in resolving the Hayden-Cartwright Act issue is thus whether the canons apply. The South Dakota court's assumption that they do is problematic for two reasons.[3]

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[3] The South Dakota court's assumption concerning the Indian canons paralleled the analytical approach employed in the four other

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First, the Act applies in all "United States military or other reservations" with respect to fuel "sold by or through post exchanges, ship stores, ship services stores, commissaries, filling stations, licensed traders, and other similar agencies." It is thus a statute of general geographic and substantive applicability within the United States as to the subject at hand – fuel sold on federal "reservations." Congress, in other words, was addressing a national concern in a national manner.[4] Under these circumstances,

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reported decisions recently addressing the Hayden-Cartwright Act's applicability to Indian reservations. *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1304-05 (D. Kan. 2003) ("the Court agrees with the Tribe and finds that the Hayden-Cartwright Act does not expressly provide for state taxation on fuels delivered in Indian country"), *appeal pending*, No. 03-3218 (10th Cir.); *Coeur d'Alene Tribe v. Hammond*, 224 F. Supp. 2d 1264, 1268 (D. Idaho 2002) ("unless Congress has been explicit in granting states authority to tax Indians, the Court should construe the statute as not allowing the taxation"), *appeals pending*, Nos. 02-35965 *et al.* (9th Cir.); *Goodman Oil Co. v. Idaho State Tax Comm'n*, 28 P.3d 996, 1000 (Idaho 2001) ("[b]y not using the term 'Indian reservation' or 'licensed Indian trader' in the relevant portion of the Act, Congress did not make it clear that it intended to abolish tribal immunity from state motor fuel taxation"), *cert. denied*, 534 U.S. 1189 (2002); *see also Winnebago Tribe v. Kline*, 297 F. Supp. 2d 1291, 1305 (D. Kan. 2004) (adopting *Prairie Band Potawatomi*'s reasoning).

[4] The circumstances prompting the Hayden-Cartwright Act's adoption reflect why Congress acted comprehensively. As Petitioners have discussed, this Court held in *Standard Oil Co. v. California*, 291 U.S. 242 (1934), that a state license tax imposed on motor fuel distributors could not be applied to gasoline sold to a post exchange within the Presidio of San Francisco, a military reservation. The decision caused substantial controversy among state tax officials and resulted two years later in the Act's passage. *See* 79 Cong. Rec. 4083 (1935); 80 Cong. Rec. 6913 (1936). Had Congress desired only to overrule prospectively the result in *Standard Oil*, it would have limited the legislation to "United States military reservations." Moreover, aside from addressing the problem of "free-loading" – the ability of drivers to purchase tax-free

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this Court has held that "general Acts of Congress apply to Indians as well as to others in the absence of a clear expression to the contrary." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960).

Tuscarora is particularly germane here. The issue there was whether lands owned in fee by a tribe and located within its reservation (362 U.S. at 105-06 & n.10) were part of a "reservation" as defined in the Federal Power Act ("FPA") and, if not, whether they were subject to condemnation when necessary for the construction, maintenance, or operation of a federally-licensed project. "Reservation" status was significant because lands within a "reservation" were not subject to condemnation absent a finding that "their taking 'will not interfere or be inconsistent with the purpose for which the reservation was

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gas but to continue use of the state highway systems – the Act furthered another Depression Era objective – employment. Gas tax revenues, unlike many other types of tax exactions, had remained fairly constant during the early part of the Depression. United States Dep't of Transp., *America's Highways: 1776-1976*, at 123-24 (1976). As the Department of Transportation's history of the nation's highway system observed, a 1932 study had determined that "for every person employed directly on [a highway construction] job, seven others were indirectly employed making cement, aggregates, and machinery and in transporting these products through the economy [because] . . . [d]ollars . . . were much more effective when used to build roads than when used for direct relief or a dole." *Id.* at 124. To encourage road construction and attendant employment, Congress penalized States that diverted gasoline taxes from highway construction, improvement, and maintenance in the Hayden-Cartwright Act of 1934. *Id.* at 124-25; *see* Act of June 18, 1934, § 12, 48 Stat. 993, 995 (1934). The 1936 Hayden-Cartwright Act was a natural adjunct to the 1934 legislation by the same sponsors, insofar as it sought to increase state revenue for use in road construction and maintenance, and furthered many of the same national objectives.

created or acquired'" *Id.* at 109. Although the FPA's definition of "reservation" specifically included Indian reservations, this Court looked to legislative history to hold that the term was intended to apply only to "reservation" land or interests owned by the United States.[5]

This Court turned then to the Tuscaroras' contention that the FPA's condemnation provision was inapplicable to tribal fee lands. It stated that the statute "constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any streams or other bodies of water over which Congress has jurisdiction under its commerce powers" and that the "[t]he Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians." 362 U.S. at 118. The Court, therefore, held that the FPA's general condemnation provision "applies to the[] lands owned in fee simple by the Tuscarora Indian Nation" (*id.*), since "it is now well settled by many decisions of this

[5] The Court reasoned that, as passed by the House of Representatives, the definition of "reservation" in the Federal Water Power Act of 1920 meant "'lands and interest in lands owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws, and lands and interest in lands acquired and held for any public purpose.'" *Tuscarora*, 362 U.S. at 112. That general definition eventually was "recast" before the Senate to insert "the words 'national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, and other.'" *Id.* The Court explained that "[i]t seems entirely clear that no change in substance was intended or effected by the Senate's amendment, and that its 'recasting' only specified, as illustrative, some of the 'reservations' on 'lands and interests owned by the United States.'" *Id.*

Court that a general statute in terms applying to all persons includes Indians and their property interests" (*id.* at 116). The South Dakota court's decision raises the question whether the Hayden-Cartwright Act, as a "general" law, presumptively applies to all persons or lands naturally coming within its terms.[6]

Second, this Court has applied the Indian canons when construing "'statutes passed for the benefit of dependent Indian tribes.'" *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)); *see also Blackfeet Tribe*, 471 U.S. at 766 ("the standard principles of statutory construction do not have their usual force in cases involving Indian law"); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003) ("the [*Blackfeet*] presumption [requiring ambiguities to be construed favorably to tribes] applies only to federal statutes that are 'passed for the benefit of dependent Indian tribes'"). *Tuscarora* again is relevant because there, despite the express inclusion of "Indian reservations" within the definition of "reservations," this Court relied on a combination of legislative history and internal statutory construction to limit the term to government-owned interests

[6] That the term "reservation" ordinarily encompasses Indian reservations also was noted by the *Tuscarora* Court when it stated that even though "by generally accepted standards and common understanding these Tuscarora lands may be part of a 'reservation,'" such fact was "not at all decisive of whether they are such within the meaning of the Federal Power Act." 362 U.S. at 111. Congress instead "was free and competent artificially to define the term 'reservation' for the purposes that it prescribed in the Act." *Id.* The Hayden-Cartwright Act contains no such "artificial[ ]" limitation.

and lands despite the prejudicial impact on the tribe from that construction. 362 U.S. at 111-14. More recently in *Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), the Court declined to construe 5 U.S.C. § 552(b)(5), the Freedom of Information Act's ("FOIA") intra-agency exception, as authorizing nondisclosure of communications between a federal agency and a tribe. In making this determination, neither the Court in its decision nor the United States in its briefs made reference to the Indian canons. *E.g.*, Brief for Petitioners at 14-17 (summary of argument), *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) (No. 99-1871). The Government instead argued unsuccessfully that its fiduciary obligation to tribes provided the predicate for inferring the exemption's applicability because such duty cloaked federal-tribal communications with the same "inter-agency" status as enjoyed by outside consultants advising agencies and because FOIA should not be construed to require agencies to act other than in a tribe's best interests when called upon to disclose federal-tribal communications. 532 U.S. at 12-16.

The propriety of the South Dakota Supreme Court's approach to construing the Hayden-Cartwright Act warrants immediate review. Not only has the Act's application been litigated intensely in other States over the last several years, but lower federal courts also have struggled with determining when tribes are subject to "general" federal statutes. With respect to the question of the Act's applicability to Indian reservations, Executive Branch opinions issued shortly after its passage left no doubt that the state motor fuel taxes could be applied to reservation sales. 38 Op. Att'y Gen. 522 (1936) (Pet. App. 80); 57 Interior Dec. 129 (1940) (Pet. App. 84). Although the South

Dakota court discounted their reasoning, those opinions constituted authoritative construction of the statute and provided a basis for the States' assumption that their fuel taxes could be applied to reservation transactions. They represented, moreover, the *sole* authority until *In re Motor Fuel Tax Liability of A.G.E.*, 273 N.W.2d 737 (S.D. 1978), where the South Dakota court stated that the Hayden-Cartwright Act *did* apply to Indian reservations. *Id.* at 739.[7] The first contrary decision was the Idaho Supreme Court's opinion in *Goodman Oil* rendered 65 years after the Act's adoption, which initiated use of the Indian canons as justification for reading the statute at odds with its literal language.[8] Prompt resolution of this issue will dispel the present uncertainty over state motor fuel taxation authority on Indian reservations and, if the Act is

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[7] The decision below characterized *A.G.E.*'s statement concerning the Hayden-Cartwright Act as dicta and then distinguished the earlier case because there, unlike here, a non-Indian taxpayer was involved. Pet. App. 21-22. The court did not explain how the term "reservation" in the Act encompasses Indian reservations when non-Indians are the taxpayer but excludes them when a tribal member is the taxpayer.

[8] During that 65-year period, Congress took no action to modify the Executive Branch construction as to the scope of the term "reservations." The sole substantive modification occurred in the Buck Act, Pub. L. No. 76-819, § 7, 54 Stat. 1059, 1060 (1940), and involved substituting the phrase "upon, with respect to, or measured by, sales, purchases, storage or use of gasoline or other motor vehicle fuels" for the phrase "upon sales of gasoline or other motor vehicle fuels" that appeared in the 1936 law. The Buck Act amendment addressed a limiting construction given the original statute because of its reference only to "sales." S. Rep. No. 76-1625, at 2 (1940); *see also Minnesota v. Keeley*, 126 F.2d 863, 866 (8th Cir. 1942). Aside from the Buck Act amendment, the other modifications to the original section 10 of the Act entailed recodification (Pub. L. No. 80-279, § 104, 61 Stat. 641, 644 (1947)) and the addition to § 104 of subsection (c) (Pub. L. No. 84-876, 70 Stat. 799 (1956)).

held not to apply, will allow States to determine whether adjustment of fuel tax legal incidence or other legislative responses are appropriate. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995).

The broader question concerning the reach of *Tuscarora's* holding is no less important. The Tenth Circuit Court of Appeals has limited the holding to federal statutes that affect "property rights." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002) (*en banc*) (section 8(a)(3) of the National Labor Relations Act does not preclude a tribe from adopting ordinance prohibiting union security agreements). Other federal courts of appeals recognize exceptions to *Tuscarora* where, *inter alia*, "the law touches 'exclusive rights of self-governance in purely intramural matters'" or "there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.'" *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). Courts have invoked these exceptions to find the Age Discrimination in Employment Act and the Fair Labor Standards Act overtime compensation requirements inapplicable to tribal entities. *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1080 (9th Cir. 2001); *Reich v. Great Lakes Indian Fish and Wildlife Comm'n*, 4 F.3d 490, 493-96 (7th Cir. 1993); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246 (8th Cir. 1993). Review of the South Dakota Supreme Court's judgment will afford this Court the opportunity to reiterate or clarify the *Tuscarora* holding.

II. BECAUSE THE SOUTH DAKOTA SUPREME COURT DEPARTED FROM ESTABLISHED FEDERAL LAW PRINCIPLES IN HOLDING A STATE LAW-CREATED CORPORATION IS ENTITLED TO IMMUNITY FROM MOTOR FUEL TAXATION, REVIEW IS WARRANTED.

Muddy Creek is incorporated under South Dakota statutes. As the state supreme court has stated on repeated occasions, "[a] firmly entrenched doctrine of American law is the concept that a corporation is considered a legal entity separate and distinct from its officers, directors and shareholders until there is a *sufficient reason* to the contrary." *Kan. Gas & Elec. Co. v. Ross*, 521 N.W.2d 107, 111 (S.D. 1994); *accord Osloond v. Osloond*, 609 N.W.2d 118, 122 (S.D. 2000); *Brevet Int'l, Inc. v. Great Plains Luggage Co.*, 604 N.W.2d 268, 273-74 (S.D. 2000). It explained further in *Kansas Gas & Electric* that the separate legal status of corporations "is considered the central purpose for choosing the corporate form because it permits corporate shareholders to limit their personal liability to the extent of their investments." 521 N.W.2d at 111. Like other American jurisdictions, South Dakota recognizes that the "corporate veil" may be pierced "to disregard the distinction between a corporation and its shareholders to prevent fraud or injustice" – *i.e.*, when the corporate form is used by shareholders, officers, or directors "to *defeat* public convenience, justify wrong, protect fraud, or defend crime." *Id.* (emphasis supplied). The veil is pierced, in other words, to impose individual liability for obligations nominally those of the corporation because of illegal or inequitable conduct by the shareholder, officer, or director.

The individual liability of Respondent Pourier is not in issue. The only liability at stake is Muddy Creek's – a fact reflected in its, and not Pourier's, status under South Dakota as an importer responsible for motor fuel tax prepayment and as a taxpayer entitled to any refunds for fuel used by corporate vehicles. The corporation, not Pourier, filed the tax refund claims. Pet. App. 53-54. Indeed, nothing in the decision below even suggests that Pourier had standing to challenge the fuel tax. *See* Pet. App. 33 (Muddy Creek possessed standing to bring suit). No allegation of wrongdoing on the part of either Respondent exists. This case is not an instance where the ordinary distinction between corporation and shareholder is disregarded as a matter of state law, and the South Dakota Supreme Court did not so hold.

It is also not a case, as the South Dakota court *did* hold, where that distinction should be ignored as a matter of federal law. This Court determined 25 years ago that the critical distinction between the categorical rule precluding state taxation on Indian reservations absent congressional authorization is membership status in the resident tribe. *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 160-61 (1980); *see also Rice v. Rehner*, 463 U.S. 713, 720 (1983) (applying distinction to non-tax state civil regulation); *cf. Chippewa Trading Co. v. Cox*, No. 03-1445, 2004 WL 828087, at *6 (6th Cir. Apr. 19, 2004) (tribally-chartered corporation does not constitute an "Indian tribe or band" under 28 U.S.C. § 1362 and therefore is subject to jurisdictional limitation in 28 U.S.C. § 1341). Nonmember Indians and non-Indians therefore are situated identically for civil regulatory purposes. This conclusion necessarily follows for artificial persons such as corporations that are ineligible for ancestry-based tribal

membership. *See* Pet. App. 56 (Pourier is a member of the Oglala Sioux Tribe by virtue of 11/32nds blood quantum). No more tenable is the proposition that a corporation may enjoy derivative tribal membership, since the very purpose of incorporation under South Dakota's and other States' law is to establish a new legal "person" separate and apart from the individuals or other entities that may own or operate the corporation. The South Dakota court simply lost its way and ruled in square opposition to this Court's precedent.[9]

While mere error alone might not warrant review, other considerations specific to the unique relationship between States and tribes do. This Court has stressed the importance in the Indian-law tax context of "'reasonably bright-line standard[s] which, from a tax administration perspective, respond[] to the need for substantial certainty as to the permissible scope of state taxation authority.'" *Chickasaw Nation*, 515 U.S. at 460. Principal among those standards is the "bright-line" distinction between members of the resident tribe and *all* others, whether Indian or non-Indian, for civil-regulatory purposes. The South

[9] The court's reliance on regulations implementing the Indian Business Development Program or more generalized economic development "[p]olicy considerations" (Pet. App. 31) was misplaced. Department of the Interior regulations deem Indian-owned corporations eligible for grants, but that fact says nothing germane about whether the corporations enjoy immunity from state taxation because of such ownership. This Court, moreover, has rejected broad-based claims of interference with economic development as a basis for preemption. *Colville*, 447 U.S. at 155-56. Among the statutes cited by the non-prevailing preemption proponents in *Colville* was the Indian Financing Act of 1974, Pub. L. No. 93-262, 86 Stat. 77 (codified as amended at 25 U.S.C. §§ 1451-1544), which created the Indian Business Development Program in 25 U.S.C. § 1521.

Dakota court's analysis and result thereby invite confusion in an area where clarity is essential for States, tribes, and taxpayers.

So, for example, the court's reasoning may be advanced to establish *pro tanto* "member" status for corporations that are partly owned by tribal members – *i.e.*, an immunity from taxation proportionate to the amount of tribal member ownership. The ramifications of the court's reasoning additionally are not restricted to taxation and provide fodder for controversy in other civil-regulatory contexts. To use another example, application of on-reservation state environmental laws, which otherwise could be enforced against a nonmember, may be compromised where the corporation's equity is owned by a tribal member. Substantially more stringent preemption standards apply when a State attempts to enforce its civil regulatory laws against members than against nonmembers. *Compare New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) ("exceptional circumstances" required before state civil regulatory authority exists over tribal members with respect to on-reservation activity), *with County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992) ("[t]his Court's more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands"); and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980) (interest-balancing test applied to on-reservation civil regulation of nonmembers doing business with tribe). The South Dakota Supreme Court's departure from the path painstakingly blazed by this Court should be rectified now.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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APPENDIX

Section 10 of the Hayden-Cartwright Act As Amended And Codified In 4 U.S.C. § 104

§ 104. Tax on motor fuel sold on military or other reservation reports to State taxing authority

(a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.

(c) As used in this section, the term "Territory" shall include Guam.